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In the Supreme Court of the United States

VIRGINIA ANDERSON,

Petitioner,

v.

WESTINGHOUSE SAVANNAH RIVER COMPANY, LLP; BECHTEL SAVANNAH RIVER, INC.; THE BABCOCK & WILCOX SAVANNAH RIVER COMPANY, INC.; and BRITISH NUCLEAR FUELS LTD. SAVANNAH RIVER CORP.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a disparate impact plaintiff under Title VII, who has shown admissible statistical evidence of adverse impact, must, as the Fourth Circuit held in this case, also establish that the employer intended to discriminate, even though this Court held in *Griggs v. Duke Power Co.* that such a showing is not required?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	8
I. A TITLE VII DISPARATE IMPACT PLAINTIFF DOES NOT HAVE TO SHOW INTENTIONALLY DISCRIMINATORY CONDUCT AND PRETEXT UNDER THE *McDONNELL DOUGLAS* DISPARATE TREATMENT FRAMEWORK	12
II. A TITLE VII DISPARATE IMPACT PLAINTIFF DOES NOT HAVE TO PRESENT STATISTICAL EVIDENCE SHOWING THAT RACE WAS THE *REASON* FOR THE ADVERSE EFFECTS OF AN EMPLOYMENT PRACTICE TO PROVE A PRIMA FACIE CASE	17
A. The Decision Places an Unjustified Higher Statistical Burden on Title VII Disparate Impact Plaintiffs	17
B. The Decision Contradicts Decades of Title VII Disparate Impact Law	25
CONCLUSION	29

TABLE OF AUTHORITIES

Page

CASES

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) 25

Allen v. City of Chicago, 351 F.3d 306 (7th Cir. 2003) 13

Allen v. Seidman, 881 F.2d 375 (7th Cir. 1989) 27

Anderson v. Westinghouse Savannah River Co., 406 F.3d 248 (4th Cir. 2005) 1

Anderson v. Westinghouse Savannah River Co., 418 F.3d 393 (4th Cir. 2005) 1

Anderson v. Zubieta, 180 F.3d 329 (D.C. Cir. 1999).... 12, 20

Bazemore v. Friday, 478 U.S. 385 (1986).....*passim*

Bazemore v. Friday, 751 F.2d 662 (4th Cir. 1984), *aff'd in part and vacated in part*, 478 U.S. 385 (1986) 22, 28

Berger v. Iron Workers Reinforced Rodmen Local 201, 843 F.2d 1395 (D.C. Cir. 1988)..... 20, 26

Bernard v. Gulf Oil Corp., 841 F.2d 547 (5th Cir. 1988) 27

Bouman v. Block, 940 F.2d 1211 (9th Cir. 1991)..... 27

Bullington v. United Air Lines, Inc., 186 F.3d 1301 (10th Cir. 1999)..... 27

Catlett v. Mo. Highway & Transp. Comm., 828 F.2d 1260 (8th Cir. 1987)..... 22

TABLE OF AUTHORITIES – Continued

Page

Connecticut v. Teal, 457 U.S. 440 (1982) 25

Dothard v. Rawlinson, 433 U.S. 321 (1977) 21, 25

EEOC v. General Telephone Co., 885 F.2d 575 (9th Cir. 1989) 22

EEOC v. Steamship Clerks Union, 48 F.3d 594 (1st Cir. 1995) 12, 26

In re: Employment Discrimination Litig. Against the State of Alabama, 198 F.3d 1305 (11th Cir. 1999) 14, 28

Griggs v. Duke Power Co., 401 U.S. 424 (1971) .....*passim*

Griggs v. Duke Power Co., 420 F.2d 1225 (4th Cir. 1970), *rev'd*, 401 U.S. 424 (1971) 9

Hameed v. Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, 637 F.2d 506 (8th Cir. 1980) 27

Hazelwood Sch. Dist. v. United States, 433 U.S. 299 (1977) 19

Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) 19, 20

Isabel v. City of Memphis, 404 F.3d 404 (6th Cir. 2005) 13

Koger v. Reno, 98 F.3d 631 (D.C. Cir. 1996) 22

Lanning v. Southeastern Pa. Transp. Auth., 181 F.3d 478 (3rd Cir. 1999) 13

Larkin v. Pullman-Standard, 854 F.2d 1549 (11th Cir. 1988), *vacated on other grounds*, 493 U.S. 929 (1989) 21

McDonnell Douglas v. Green, 411 U.S. 792 (1973) 7, 15, 18

TABLE OF AUTHORITIES – Continued

Page

Morgan v. United Parcel Serv., 380 F.3d 459 (8th Cir. 2004) 20, 22

Munoz v. Orr, 200 F.3d 291 (5th Cir. 2000) 13

Murrell v. Ocean Mecca Motel, 262 F.3d 253 (4th Cir. 2001) 14, 15

Newark Branch, NAACP v. Town of Harrison, 940 F.2d 792 (3d Cir. 1991) 26

Ortega v. Safeway Stores, Inc., 943 F.2d 1230 (10th Cir. 1991) 14

Palmer v. Shultz, 815 F.2d 84 (D.C. Cir. 1987) 22

Patton v. Mississippi, 332 U.S. 463 (1947) 21

Phillips v. Cohen, 400 F.3d 388 (6th Cir. 2005) 27

Radue v. Kimberly-Clark Corp., 219 F.3d 612 (7th Cir. 2000) 18

Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147 (2d Cir. 2001) 10, 12

Rose v. Wells Fargo, 902 F.2d 1417 (9th Cir. 1990) 13

Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984) 10, 22

Smith v. City of Des Moines, 99 F.3d 1466 (8th Cir. 1996) 13

Smith v. Va. Commonwealth Univ., 84 F.3d 672 (4th Cir. 1996) 22

Sobel v. Yeshiva Univ., 839 F.2d 18 (2d Cir. 1988) 22, 23

Trout v. Lehman, 702 F.2d 1094 (D.C. Cir. 1983), *vacated on other grounds*, 465 U.S. 1056 (1984) 23

Turner v. Fouche, 396 U.S. 346 (1970) 24

United States v. SCRAP, 412 U.S. 669 (1973) 21

TABLE OF AUTHORITIES – Continued

Page

Waisome v. Port Auth. of N.Y. & N.J., 948 F.2d 1370 (2d Cir. 1991) 26

Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988) 12, 15, 18, 26

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 2

28 U.S.C. § 1343(a)(4) 2

42 U.S.C. § 1981 15

42 U.S.C. § 2000e-*et seq.* ("Title VII") 2, 10, 13, 14

MISCELLANEOUS

Deborah Sontag, *The Power of the Fourth*, N.Y. Times, Mar. 9, 2003, § 6 (Magazine) 16

PETITION FOR A WRIT OF CERTIORARI

Anderson respectfully petitions this Court for a writ of *certiorari* to review a judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fourth Circuit, affirming summary judgment for defendants-respondents Westinghouse Savannah River Company ("WSRC"); Bechtel Savannah River, Inc; The Babcock & Wilcox Savannah River Company; and British Nuclear Fuels Ltd., Savannah River Corp. (collectively "respondents"), is reported as *Anderson v. Westinghouse Savannah River Co.*, 406 F.3d 248 (4th Cir. 2005) and is attached to the Appendix at App. 1. In a 7 to 5 decision the Fourth Circuit denied rehearing en banc, reported as *Anderson v. Westinghouse Savannah River Co.*, 418 F.3d 393 (4th Cir. 2005), attached to the Appendix at App. 90. The District Court's unreported order granting summary judgment is attached to the Appendix at App. 68.

STATEMENT OF JURISDICTION

The judgment of the Fourth Circuit en banc denying rehearing was entered August 9, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the interpretation and application of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e-*et seq*. The relevant portion of Title VII provides:

> 1(A) An unlawful employment practice based on disparate impact is established under this subchapter only if –
>
> (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race . . . and the respondent fails to demonstrate that the challenged practice is job-related for the position in question and consistent with business necessity; or
>
> (ii) the complaining party makes the demonstration described . . . with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

42 U.S.C. § 2000e-2k(1)(A)(i), (ii).

STATEMENT OF THE CASE

In 1997, twelve African-American employees filed a class action lawsuit against respondents, the four employers at the Savannah River nuclear waste processing site (the "Site"), alleging race discrimination in violation of Title VII and jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a)(4) and 42 U.S.C. § 2000e-5(f)(3). (App. 15) In 1999, petitioner Anderson and eighty-six other African-American employees were added as plaintiffs. *Id.* The

class representatives claimed that respondents maintained a pattern and practice of discrimination against African-Americans and used employment practices that had a racially disparate impact. *Id.* The District Court denied class certification and directed each named plaintiff to proceed individually. (App. 16) Anderson filed a Fourth Amended Complaint, asserting only individual claims. *Id.*

Anderson has been employed by WSRC since 1978 and, in significant respects, typifies the individual African-Americans described in the putative class definition. (App. 5) She alleges that she was denied promotions due to her race and that respondents' Competency Based Posting System ("CBPS") for promotions had a racially disparate impact on her and other African-Americans. (App. 6)

The CBPS is a three-step job posting system first implemented in mid-1997, through which most exempt job openings must be filled. (App. 6-7) First, applicants submit a resume or personal history form and performance appraisals. The Human Resources division ("HR") screens applicants for a position's minimum qualifications. (App. 8) HR forwards to the hiring manager the applicants' documents with a list of qualified applicants on a form that provides, *inter alia*, the race of the applicants.

Second, the hiring manager and a panel of two or more managers chosen by the hiring manager select some of the qualified applicants for interview by scoring their resumes against weighted CBPS job criteria, consisting of general "core competencies" and specific "functional competencies." (App. 10) Third, the hiring manager and panel interview the selected applicants and score their responses to highly subjective questions about the competencies. *Id.*

The hiring manager makes the final selection on subjective grounds. Thus, the CBPS is inherently subject to the discretion of mostly white managers.

The CBPS has had a statistically significant adverse impact on African-American employees, including Anderson. (App. 29-30) The class representatives' expert found a statistically significant under-representation of, and adverse effect on, African-American employees at the second and third CBPS stages. *Id.* Overall differences from the expected number of selections were equivalent to -4.51 standard deviations; for the individual steps, from -2.38 to -6.64 standard deviations.[1] Anderson, like many other African-American employees, was repeatedly rejected for promotion under this system.

In or about December 1997, WSRC posted an opening for an Administrative Assistant position with the following minimum qualifications:

> [h]igh school diploma and 8-12 years practical experience in a business or administrative area or Associate Degree in a nontechnical or business discipline with at least 4-7 years practical experience in business or administrative area or BS/BA in a nontechnical or business discipline and at least 1-3 years of practical experience in business, administrative, budgeting or program planning.

The posting also stated that the required core competencies for the position were "customer focus," "flexibility," "problem solving" and "professional."

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[1] These statistics were admitted into evidence.

At the time of the posting, Anderson had earned an Executive Secretary Diploma and a Bachelor of Science degree in Human Resources Management, was attending school at night to complete her Masters in Business Administration ("MBA"),[2] and had over nineteen years of experience performing administrative duties at the Site. (App. 70) Anderson had also received several awards, including a Vice-President Award, in recognition of her initiative and exceptional work. Anderson applied for the Administrative Assistant position but was not selected.[3] *Id.*

Instead, Linda Clarke, a white applicant, was selected for the position despite being objectively less qualified. (App. 70) Clarke had a high school diploma and at most seven years of Site experience, far less than Anderson's nineteen.[4] Nonetheless, the white hiring manager, and two other white managers, gave Anderson a score of 136 and Clarke a score of 190 on the CBPS Selection Matrix. (App. 72) The managers explained the reason: they were "impressed with [Clarke's] enthusiasm and just how well she responded to questions" at the interview. (App. 72-73)

---

[2] Anderson received her MBA in 1998.

[3] Anderson's performance appraisals demonstrate that she easily met all listed core and functional competencies. From October 1991 through July 1996, Anderson's performance appraisals stated that she "consistently produces high quality results . . . goes the 'extra mile' . . . eager to learn new things . . . makes genuine effort to assist others to get the job done"; "consistently met and frequently exceeded the expectations of her customers"; "takes action as required with little or no guidance . . . the only Secretary in MTS serving the needs of 49 full-time SRTC employees plus Co-Ops/Summer Interns"; and that her "attitude and work ethics are exemplary."

[4] Both were performing administrative duties when they applied and were rated "excellent" throughout their careers.

Less than a month later, in January 1998, Anderson was again denied a posted Administrative Assistant position. (App. 75) A less qualified white applicant, Brenda Pearson-Boggs ("Boggs"), was given the job. Even though Anderson was designated by HR as qualified and also received a recommendation from her supervisor, she was not even interviewed. The posted education and experience requirements were the same as for the prior position, and once again Anderson surpassed the requirements. However, the white hiring manager, Virginia Wolfe, had a white applicant in mind and, contrary to WSRC's policy, considered Boggs, her secretary of four years, a "preferred candidate" before the position was even posted. (App. 75-76) Wolfe tried to promote Boggs without posting the position and posted it only after being told that posting was required. Wolfe never read WSRC's Affirmative Action policy.

The three white managers found only Boggs and another white applicant eligible for interviews. They interviewed only those applicants who scored at least fifty percent on all competencies and sixty percent on functional competencies. (App. 77, n. 7) Not surprisingly, Wolfe gave Boggs a perfect score on the functional competencies. The panel gave Anderson "0" for the "customer support" functional competency despite comments in her performance appraisals of her "mak[ing] genuine effort to assist others to get the job done," that she "consistently met and frequently exceeded the expectations of her customers" and that she "[took] action as required with little or no guidance."

Other objective evidence showed that Anderson was more qualified than Boggs. Both Anderson and Boggs were

performing administrative duties as non-exempt employees when they applied. Boggs, however, had only a high school diploma, and began working at the Site in 1989. Anderson had earned a college degree, was completing her Masters Degree, and had been at the Site since 1978. (App. 6)

The Fourth Circuit affirmed the District Court's granting of summary judgment on Anderson's disparate impact claim. (App. 48-49) But it analyzed Anderson's claim using the disparate treatment standard set forth in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), and not the disparate impact standard established by this Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971):

> So the question is whether the proffered circumstantial evidence of discriminatory *impact* is sufficient to satisfy the *McDonnell Douglas* framework of proof. . . . '[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all time with the plaintiff.'

(App. 32, emphasis added and citations and quotation marks omitted)

The Fourth Circuit also required Anderson to demonstrate to a statistical certainty that race was the reason for the adverse effects she suffered and to prove that respondents' explanation was pretext for discrimination, elements that would properly be required to prove intentional discrimination, not disparate impact:

> From that evidence [that the percentage of black applicants who actually succeeded at each step in the CBPS promotion system was much lower than statistically expected], which does not

> account for any other variables, Miss Anderson argues that causation is proven.
>
> We do not agree. This evidence does not show that the *reason* black applicants failed to proceed at the interview selection stage and position selection stage was their *race*.

(App. 30, emphasis added)

In a circuit that has the highest percentage of African-Americans of any circuit in the country, and in a region that has a history of invidious racial discrimination, the Fourth Circuit's ruling has effectively eliminated the disparate impact doctrine. As Judge Gregory eloquently stated in his dissent from denial of reconsideration, "what was a high jump has now become a pole vault that must be accomplished without a pole. . . . I can only hope that a higher court will remedy the error committed here." (App. 93-94) Accordingly, *certiorari* should be granted.

REASONS FOR GRANTING THE PETITION

In *Griggs*, this Court reversed a decision of the Fourth Circuit that had required, as the Fourth Circuit again did in this case, that plaintiffs in a disparate impact class action prove an employer's discriminatory intent in order to challenge a facially neutral selection procedure that disqualified African-Americans at a substantially higher rate than white applicants. 401 U.S. 424, 429. One judge of the Court of Appeals disagreed then, identifying the serious mistake of such reasoning:

> The pattern of racial discrimination in employment parallels that which we have witnessed in other areas. Overt bias, when prohibited, has

> ofttimes been supplanted by more cunning devices designed to impart the appearance of neutrality, but to operate with the same invidious effect as before. . . . Distilled to its essence, the underpinning upon which my brethren posit their argument is their expressed belief in the good faith of Duke Power. For them, the crucial inquiry is not whether the Company can establish business need, but whether it has a bad motive or has designed its tests with the conscious purpose to discriminate against blacks. . . . But this is no answer. . . .
>
> A man who is turned down for a job does not care whether it was because the employer did not like his skin color or because, although the employer professed impartiality, procedures were used which had the effect of discriminating against the applicant's race. Likewise irrelevant to Title VII is the state of mind of an employer whose policy, in practice, effects discrimination. . . . The use of criteria that are not backed by valid and corroborated business needs cannot be allowed, regardless of subjective intent.

Griggs v. Duke Power Co., 420 F.2d 1225, 1238, 1244, 1245-46 (4th Cir. 1970) (Sobeloff, J., dissenting), *rev'd*, 401 U.S. 424 (1971).

This Court reversed, holding that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." 401 U.S. at 431. For a disparate impact claim, "[t]he touchstone is business necessity." *Id.* If an employment practice that has a disparate impact on a protected class "cannot be shown to be related to job performance, the practice is prohibited." *Id.* This Court's critical holding that Title VII addresses "the *consequences* of employment practices, not

simply the motivation," *id.* at 432 (emphasis in original), was necessary to eliminate employment procedures that operate as "built-in headwinds" that block minority workers from employment opportunities and advancement. *Id.*

In the generation since then, this Court has reaffirmed the *Griggs* standard in numerous cases, *see* below at 12, all the Courts of Appeals have followed *Griggs*, *see* below at 12-14 and Congress has codified its requirements for proving a Title VII disparate impact violation in the 1991 Amendments to Title VII, 42 U.S.C. § 2000e-2k, *see* below at 14.

Despite the many years of clear and consistent precedent and Congressional action distinguishing between the analysis and proof of (a) disparate impact claims of racial discrimination, under which the employer's intent is irrelevant, and (b) disparate treatment claims, where proof of intentional discrimination is necessary,[8] in this case the Fourth Circuit has again required plaintiffs to show intentional discrimination as an element of a disparate impact claim. It has reaffirmed that requirement by denying a petition for rehearing en banc, although five

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[8] Disparate impact claims "are attacks on the systemic *results* of employment practices." *Segar v. Smith*, 738 F.2d 1249, 1267 (D.C. Cir. 1984) (emphasis added). Thus, while treatment claims inquire into, and require proof of, intent, impact claims focus on the effects of practices. "[W]here the inquiry in a pattern-or-practice disparate treatment claim is focused on determining the existence of discriminatory intent, disparate impact claims are concerned with whether employment policies or practices that are neutral on their face and were not intended to discriminate have nevertheless had a disparate effect on the protected group. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) (stating that an employer's 'good intent' is irrelevant to a disparate impact claim)." *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 160 (2d Cir. 2001).

members of that court voted for such rehearing. (App. 92) The result of such a requirement is just as pernicious now as it was before:

> As a court, we are now on record as not only requiring almost certain causation to demonstrate a prima facie case but also requiring a *McDonnell Douglas* showing, in effect forcing a disparate impact claimant to show intent. In other words, what was once a high jump has now become a pole vault that must be accomplished without a pole.... At every turn the majority opinion took pains to impose upon the disparate impact claimant a standard higher than that required by Title VII jurisprudence.... I fear that this outcome will have the effect of discouraging future Title VII claimants with legitimate claims from proceeding before this Court.

(App. 93-94) (Gregory, J., dissenting from denial of reconsideration)

Although the Fourth Circuit found petitioner's expert's CBPS statistics admissible (App. 31) – and indeed assumed that they showed a prima facie case of disparate impact (App. 32) – it immediately, in the opinion's next sentence, followed its acceptance of petitioner's prima facie case not with the question whether respondents had shown a business necessity for the CBPS procedures, but whether "the proffered circumstantial evidence of discriminatory *impact* is sufficient to satisfy the *McDonnell Douglas* framework of proof," which it correctly described as requiring petitioner to show a pretext for unlawful discrimination. (*Id.*, emphasis added) In so doing, the court, without explanation or justification, substituted (a) the question of whether respondents had a discriminatory intent to cause the disparate impact for (b) whether the

CBPS practice caused the disparate impact; and it wrongly gave petitioner the burden to prove discriminatory intent. This can hardly be described as a mere mistake because petitioners sought reconsideration, which the court, over the votes of five judges, refused.

I. A TITLE VII DISPARATE IMPACT PLAINTIFF DOES NOT HAVE TO SHOW INTENTIONALLY DISCRIMINATORY CONDUCT AND PRETEXT UNDER THE *McDONNELL DOUGLAS* DISPARATE TREATMENT FRAMEWORK

The *Griggs* standard was reaffirmed in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 998 (1988) ("This Court has repeatedly reaffirmed the [*Griggs*] principle that some facially neutral employment practices may violate Title VII even in the absence of a demonstrated discriminatory intent."). The correct standard for evaluating disparate impact claims has repeatedly been followed by the Courts of Appeals:

> *Anderson v. Zubieta*, 180 F.3d 329, 338 (D.C. Cir. 1999) (proof of discriminatory motive not required under disparate-impact theory);
>
> *EEOC v. Steamship Clerks Union*, 48 F.3d 594, 601-02 (1st Cir. 1995) (defendant's good faith not a defense to disparate impact claim);
>
> *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 160 (2d Cir. 2001) (pattern-or-practice disparate treatment claim focused on determining existence of discriminatory intent; disparate impact claim concerned with whether facially neutral practice not intended to discriminate nevertheless has disparate effect on protected group);

Lanning v. Southeastern Pa. Transp. Auth., 181 F.3d 478, 485, 489 (3rd Cir. 1999) (disparate impact Title VII theory judicially created in *Griggs* combats type of covert discrimination in which facially neutral practices unnecessarily and disparately exclude protected groups from employment opportunities);

Munoz v. Orr, 200 F.3d 291, 299 (5th Cir. 2000) (disparate impact claims recognized in *Griggs* do not require proof of intent to discriminate but focus on facially neutral practices that create such statistical disparities that they are functionally equivalent to intentional discrimination);

Isabel v. City of Memphis, 404 F.3d 404, 411 (6th Cir. 2005) (in three-part burden-shifting test to determine unlawful disparate impact plaintiff must establish a prima facie case that adverse impact has occurred, employer must show practice has manifest relationship to employment, and plaintiff must then show that selection protocols would serve employer's interest without undesirable discriminatory effect);

Allen v. City of Chicago, 351 F.3d 306, 311-12 (7th Cir. 2003) (same burden-shifting test under 42 U.S.C. § 2000e-2(k)(1)(A)(i));

Smith v. City of Des Moines, 99 F.3d 1466, 1469 (8th Cir. 1996) (disparate impact plaintiff need not prove discriminatory motive);

Rose v. Wells Fargo, 902 F.2d 1417, 1423-24 (9th Cir. 1990) (illicit motive or intent irrelevant to impact analysis that is designed to implement Congressional concern with consequences, not motivation, of employment practices);

Ortega v. Safeway Stores, Inc., 943 F.2d 1230, 1242 (10th Cir. 1991) (claim of disparate impact does not require finding of intentional discrimination);

In re: Employment Discrimination Litig. Against the State of Alabama, 198 F.3d 1305, 1311 (11th Cir. 1999) (*Griggs* formulates core of disparate impact analysis that proscribes practices fair in form but discriminatory in operation).

Congress codified the *Griggs* standard in the 1991 Amendments to Title VII, which state that after a plaintiff establishes a prima facie case of disparate impact, a defendant must prove that the challenged employment practice is job-related for the position in question and consistent with business necessity. 42 U.S.C. § 2000e-2(k)(1)(A)(i). If the employer establishes its burden of proof, the employee may still prevail by showing the existence of an equally effective alternative practice that eliminates the disparate impact, which the employer has refused to adopt. *Id.*, § 2000e-2(k)(1)(A)(ii).

In this case, however, the Fourth Circuit inexplicably rejected the correct disparate impact analysis. Instead, it analyzed petitioner's disparate impact claims under the disparate treatment method. The Fourth Circuit ignored the distinction between the two and held that, assuming that petitioner had satisfied the prima facie disparate impact case, "the question is whether the proffered circumstantial evidence of discriminatory impact is sufficient to satisfy the *McDonnell Douglas* framework of proof." (App. 32) Indeed, the court explicitly stated that it followed the burden shifting scheme used in *Murrell v. Ocean Mecca Motel*, 262 F.3d 253 (4th Cir. 2001), a case in which plaintiffs brought claims of intentional discrimination

under 42 U.S.C. § 1981.[6] As the Fourth Circuit acknowledged in *Murrell*, "Section 1981 only proscribes purposeful discrimination." *Murrell*, 262 F.3d at 257.

In holding that petitioner was required to prove intentional discrimination to establish a disparate impact claim, the Fourth Circuit set forth a standard that directly contradicts this Court's holdings in *Griggs* and *Watson*, the holdings of the circuit courts and the plain language of the 1991 Amendments to Title VII. As Judge Gregory wrote in his dissent from the panel decision, "It is important to note that while the Supreme Court has enunciated burden-shifting schemes for both disparate treatment and disparate impact, the schemes possess critical differences that prevents one from applying either test in the other context." (App. 64)

Because the Fourth Circuit used the wrong standard in evaluating Anderson's disparate impact claims, and because the same incorrect standard was used by the district court, no court has ever examined whether respondents can prove that the CBPS is job-related and consistent with business necessity. In fact, respondents have never even advanced such an argument, nor have they been required to do so. As Judge Gregory wrote in his first dissent, "Given the struggles of this nation, a practice that has a disparate adverse impact on a protected class,

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[6] Under *McDonnell Douglas*, if a plaintiff establishes a prima facie case of disparate treatment discrimination, a defendant must articulate a legitimate, non-discriminatory reason for taking the adverse employment action. 411 U.S. at 802. If the defendant supplies a legitimate, non-discriminatory reason, then the plaintiff must present evidence to prove that the defendant's articulated reason was a pretext for unlawful discrimination. *Id.* at 804.

and yet either has no legitimate business justification, or can be achieved in a less harmful manner, is not a practice that we should allow to stand." (App. 60)

Rather than require respondents to demonstrate that the CBPS is consistent with a business necessity and job-related, the Fourth Circuit asked whether respondents had put forth legitimate business reasons explaining why petitioner did not receive the specific promotions for which she applied under the CBPS, and then determined that she did not prove that respondents' reasons were a pretext for discrimination. (App. 32-33) As Judge Gregory noted, the decision "in essence held that Ms. Anderson had failed to prove intent." (App. 65) Such reasoning has no place in the analysis of petitioner's disparate impact claims because "in the context of her disparate impact claim, *Ms. Anderson was under no obligation to prove intent.*" *Id.*, emphasis in original.

The Fourth Circuit's decision cannot be overlooked as an anomaly. Petitioner gave the court the opportunity to reconsider its holding by petitioning for rehearing en banc, and five of twelve judges voted to rehear the case. (App. 92) But the Fourth Circuit consciously decided to reject the caselaw set forth by this Court and the other circuits and to impede plaintiffs' ability to state a disparate impact claim. If this decision is permitted to stand, the law in the Fourth Circuit – which has the highest number of African-American citizens of any of the circuits[7] – will be irreconcilable with this Court's jurisprudence, preventing possibly thousands of putative class members in petitioner's case,

[7] *See* Deborah Sontag, *The Power of the Fourth*, N.Y. Times, Mar. 9, 2003, § 6 (Magazine), at 40.

and many more future plaintiffs, from having an opportunity for relief from effectively discriminatory practices.

II. A TITLE VII DISPARATE IMPACT PLAINTIFF DOES NOT HAVE TO PRESENT STATISTICAL EVIDENCE SHOWING THAT RACE WAS THE *REASON* FOR THE ADVERSE EFFECTS OF AN EMPLOYMENT PRACTICE TO PROVE A PRIMA FACIE CASE

Although the Fourth Circuit found the expert's CBPS statistics admissible, it nevertheless held "[t]his evidence does not show that the *reason* black applicants failed to proceed at the interview selection stage and position selection stage was their *race*." (App. 30, emphasis added) This heightened standard of causation would explicitly require petitioner to show, through statistical proof of *more than* disparate impact, that race was the cause of differential promotion outcomes – rather than that the CBPS practices, whether or not racially motivated, were the cause of such discriminatory impact. Thus, the Fourth Circuit demanded a statistical method of proving a prima facie case that, like the decision's explicit legal analysis, also required petitioner to prove intentional race discrimination in a disparate impact case, thereby defying this Court's clear standards dating back to *Griggs*.

A. The Decision Places an Unjustified Higher Statistical Burden on Title VII Disparate Impact Plaintiffs

Here, it was sufficiently disputed on summary judgment that the CBPS subjectivity itself – at the second stage in selecting employees to be interviewed, and at the third stage in selecting employees to be promoted from

those interviewed – was causally connected to the racial disparity in promotions: mostly white managers made and were permitted to make subjective scores and evaluations based on subjective criteria, and those decisions determined who received interviews and promotions. That connection is what is necessary under the disparate impact analysis of this Court and the circuit courts to state a prima facie case and thereby require a responsive showing of business necessity. *See* below at 25-28; *Watson*, 487 U.S. at 994 ("Once the employment practice at issue has been identified, causation must be proved; that is, the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group.").[8]

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[8] The contrast between the use of statistical proof in disparate treatment cases and disparate impact cases is illustrated by *Radue v. Kimberly-Clark Corp.*, 219 F.3d 612, 616-17 (7th Cir. 2000). The Seventh Circuit noted that because adverse employment actions may be correlated with age of employees for reasons other than intentional discrimination, causation is suggested only when the other variables are shown to be insignificant; and, therefore, statistical evidence must take into account nondiscriminatory explanations to permit an inference of discrimination. *Id.* Because the plaintiff there failed to suggest why obvious, alternative explanations were likely not the actual reasons for layoffs, he did not establish that the layoff was result of *intentional* discrimination. *Id.* at 617. In intentional discrimination cases, where the plaintiff must show that a discriminatory intent caused the adverse result, it is necessary to take into account other non-discriminatory explanations. Indeed, that is the premise of the *McDonnell Douglas* order of proof – to eliminate the most likely non-discriminatory reasons so that the inference of intentional discrimination is supplied and then can be tested by requiring a showing of pretext. But disparate impact analysis does not aim to find out whether a discriminatory intent caused the adverse impact results: intent is irrelevant in these cases, and the question is whether the practice, no matter what its intent, caused the result.

What the Fourth Circuit erroneously did, however, was to demand additional proof of intent to discriminate to be found in "the judgment of the members of the panel" making CBPS decisions, in order to demonstrate the real "reason black applicants failed to proceed at the interview selection stage and position selection stage." (App. 30) Under disparate impact analysis, however, the reasons for the managers' decisions are irrelevant. What must be shown, as petitioner did, is that the decisions were made and permitted to be made subjectively by the challenged practice, and that the practice and decisions resulted in a statistically significant adverse impact that could not be the result of chance. *See* below at 25-28.

Thus, the Fourth Circuit erroneously required a statistical analysis to look, and control, for other variables that it assumed could explain the statistically significant racial disparity. But in *Bazemore v. Friday*, 478 U.S. 385, 400 (1986), this Court made clear that an expert statistical analysis need not take into account "all measurable variables" to prove discrimination.[9] Requiring such control

[9] Even in "pattern or practice" cases in which plaintiffs do have the burden of proving intent to discriminate, this Court has not required them to prove more than a statistically significant difference in selection rates. Where "gross statistical disparities can be shown, they alone in a proper case constitute prima facie proof of a pattern or practice of discrimination." *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-08 (1977) (citing *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977)). In *Hazelwood*, the defendant used subjective selection criteria similar to that used by respondents and noted by the Fourth Circuit here (App. 30): "personality, disposition, appearance, poise, voice, articulation, and ability to deal with people." 433 U.S. at 302. But this Court did not require the plaintiffs in *Hazelwood* to somehow account for the possible effect of such subjective factors in selecting applicants. Similarly, in *Teamsters*, although the employer and union insisted that half a dozen factors not considered in plaintiff's

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for the very factors being challenged – inherently subjective criteria and the subjective decisionmaking about them[10] – has no basis in fact or law. *Anderson v. Zubieta*, 180 F.3d at 342 ("If we were to require that the very factor that causes disparate impact be included in the comparison for purposes of establishing a prima facie case, we would effectively define disparate impact analysis out of existence."); *Berger v. Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395, 1417-18 (D.C. Cir. 1988) (rejecting defendant's contention that racial disparity could be explained by inability to satisfy training requirement since that requirement was "the discriminatory practice at issue"); *Morgan v. United Parcel Serv.*, 380 F.3d 459, 470 (8th Cir. 2004) ("Regression analyses in discrimination cases attempt to control for the legitimate reasons for pay disparities through the use of explanatory variables. But, illegitimate reasons – reasons themselves representative of the unlawful discrimination at issue – should be excluded from the regression (or otherwise dealt with) to avoid underestimating the significance of a disparity." (citation omitted)).

Moreover, in stating that statistical evidence had not proved causation, the Fourth Circuit implicitly assumed that controlling for such other subjective factors would make a difference in the disparate outcomes. Even if a

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analysis might have explained away the disparity, and also presented expert criticism of plaintiff's methodology, this Court held that the plaintiff was under no obligation to "fine tun[e]" its statistics. 431 U.S. at 342 n.23.

[10] The managers' subjective assessment of how the applicants ranked in the competencies and how the applicants performed in the interview are the variables that petitioner challenged as causing the disparate impact. (App. 62, Gregory, J., dissenting from panel decision)

control for managers' subjective evaluations were methodologically necessary, which it is not, and possible to measure,[11] there is no evidence that it would alter the statistical results; but an employer has the burden to demonstrate that including additional omitted variables would do just that. *Bazemore*, 478 U.S. at 402 (where defendant attributed disproportionate contribution by county to salaries, it bore burden of proving that inclusion of county as variable would explain racial disparities).[12]

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[11] The court did not point to any evidence in the record suggesting how such factors could be measured and "never explains how such control would even be possible." (App. 62-63, Gregory, J., dissenting from panel decision) *See also Larkin v. Pullman-Standard*, 854 F.2d 1549, 1555, 1581 (11th Cir. 1988) (impossibility of taking into account in statistical analysis "generalized criteria" such as "ability to get along with other employees"), *vacated on other grounds*, 493 U.S. 929 (1989).

[12] "Respondents' strategy at trial was to declare simply that many factors go into making up an individual employee's salary; they made no attempt . . . to demonstrate that when these factors were properly organized and accounted for there was no significant disparity between the salaries of blacks and whites." *Bazemore*, 478 U.S. at 404 n.14. *See also Patton v. Mississippi*, 332 U.S. 463, 468 (1947) (in response to suggestion that paucity of black jurors might have been due to a lack of qualifications, the Court observed "[I]f it can possibly be conceived that all of them were disqualified for jury service . . . , we do not doubt that the State could have proved it."); *Dothard v. Rawlinson*, 433 U.S. 321, 331 (1977) ("If the employer discerns fallacies or deficiencies in the data offered by the plaintiff, he is free to adduce countervailing evidence of his own. In this case no such effort was made."); *United States v. SCRAP*, 412 U.S. 669, 688 (1973) (defendant who wishes to rebut prima facie case must offer substantial evidence, not merely "an ingenious academic exercise in the conceivable").

In the Fourth Circuit's decision below in *Bazemore*, the dissenting judge correctly pointed out that rejection of a multiple regression analysis:

> for failure to include a number of other independent variables *merely hypothesized* by defendants . . . would effectively destroy the ability to establish any Title VII pattern

(Continued on following page)

"Following *Bazemore*, courts have taken the view that a defendant cannot undermine a regression analysis simply by pointing to variables not taken into account that might conceivably have pulled the analysis's sting. *See, e.g., Palmer v. Shultz*, 815 F.2d 84, 101 & n.13, 106 (D.C. Cir. 1987) (possible impact of individual preferences insufficient to justify rejection of plaintiffs' analysis; defendant cannot rebut statistical evidence 'by mere conjectures or assertions, without introducing evidence . . . that the missing factor can explain the disparities'); *Segar*, 738 F.2d at 1277 (similar); *EEOC v. General Telephone Co.*, 885 F.2d 575, 582 (9th Cir. 1989) (similar); *Sobel v. Yeshiva Univ.*, 839 F.2d 18, 33-34 (2d Cir. 1988) (similar)." *Koger v. Reno*, 98 F.3d 631, 637 (D.C. Cir. 1996); *accord Smith v. Va. Commonwealth Univ.*, 84 F.3d 672, 676 (4th Cir. 1996). "When a defendant attacks a plaintiff's regression, he must typically do more than point out the flaws in his opponent's analysis. Instead, the defendant must show that the omission had an impact on the result." *Morgan*, 380 F.3d at 468-69 (citing *Catlett v. Mo. Highway & Transp. Comm.*, 828 F.2d 1260 at 1266 (8th Cir. 1987)).[13]

> or practice claim by this means of proof. . . . it will always be possible for Title VII defendants to hypothesize yet another variable that might theoretically reduce a race-effect coefficient demonstrated by any multiple regression analysis that could be conceived. . . . For all this record discloses, no one of the variables merely hypothesized by the defendants and relied upon by the court would have had any effect on the race-effect coefficient.

Bazemore v. Friday, 751 F.2d 662, 692-93 (4th Cir. 1984) (Phillips, J., dissenting) (emphasis added), *aff'd in part and vacated in part*, 478 U.S. 385 (1986).

[13] *Sobel* illustrates the correct application of this Court's principles on statistical proof:

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Bazemore requires only that a regression analysis account for the "major factors" affecting a challenged practice. *Id.* at 400. Here, the selection procedures of the CBPS promotion process had already taken into account all of the objective criteria that respondents used to evaluate candidates for promotions: by the second stage the pool of applicants had been determined qualified by respondents, and at the third stage the hiring manager and hiring panel had identified the most qualified for the final selection pool according to the core and functional competencies for the particular position. (App. 8-9) After petitioner accounted for the major factors, it was then respondents' burden to show that this procedure was one of business necessity, not that its managers had good

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> We read *Bazemore* to require a defendant challenging the validity of a multiple regression analysis to make a showing that the factors it contends ought to have been included would weaken the showing of a salary disparity made by the analysis. . . . Yeshiva's experts simply criticized plaintiffs' failure to include them, offering no reason, in evidence or analysis, for concluding that they correlated with sex and therefore were likely to affect the sex coefficient. . . . In short, if Yeshiva seeks to show that plaintiffs' regression analysis suffers from failure appropriately to adjust raw salary disparities for differences in productivity, it must actually demonstrate that failure. It cannot rely on assumptions about imperfections inherent in productivity proxies, nor can it simply propose alternative variables without justifying their inclusion (citation omitted)."

Sobel, 839 F.2d at 34-35. *See also Trout v. Lehman*, 702 F.2d 1094, 1102 (D.C. Cir. 1983) ("When a plaintiff submits accurate statistical data, and a defendant alleges that relevant variables are excluded, defendants may not rely on hypothesis to lessen the probative value of plaintiff's statistical proof. Rather, defendant . . . must either rework plaintiff's statistics incorporating the omitted factors or present other proof undermining plaintiff's claims."), *vacated on other grounds*, 465 U.S. 1056 (1984).

intent. It was not petitioner's burden to prove that the managers had a prohibited intent or that the expert's analysis did not control for the subjective factors that produced the disparate results.

Neither the Fourth Circuit nor respondents made any showing that taking into account the subjective factors would have explained or eliminated the observed disparities. In the face of petitioner's sufficient prima facie case of statistically significant racial disparities, respondents must do more than deny racial motivation and say there *could* be another legitimate explanation without offering evidence that such explanation actually results in the differential selection observed. The attempt here to say that the statistics do not conclusively prove discrimination fails because that is not petitioner's burden. *See* above at 17-18. Similarly, an attempt to assert generally that competency scores explain the disparity in promotions does not meet the burden that respondents do have. *Turner v. Fouche*, 396 U.S. 346, 361 (1970) (State must offer sufficient evidence to dispel prima facie statistical case of discrimination against African-Americans disqualified from jury service as not "upright" or "intelligent").

In sum, the Fourth Circuit's determination that petitioner could not satisfy the causation requirement of her prima facie disparate impact claim cannot be squared with the standard set forth in *Bazemore*. As Judge Gregory stated, "where a party shows that there is a statistically significant under-representation of African-Americans successfully completing a challenged subjective stage of a hiring process despite a number of qualified African-American candidates," it is unclear "how an *inference* of causation for the purposes of establishing a prima facie case of disparate impact has not been shown." (App. 62,

Gregory, J., dissenting from panel decision, emphasis in original) This is especially true "at the third stage where all African-American interviewees were considered to be among the most qualified applicants." *Id.* at 62 n.4.

B. The Decision Contradicts Decades of Title VII Disparate Impact Law

Just as the decision below explicitly runs afoul of the settled law regarding intent, its statistical approach – that, as shown above, effectively requires proof of intent – also is completely inconsistent with the use of statistical analysis to make out a prima facie case. *Griggs* and this Court's subsequent decisions have not – as the Fourth Circuit erroneously did here – required plaintiffs to account for alternative possible legitimate causes of statistical variations to prove that the challenged practice caused an adverse impact. *See Griggs*, 401 U.S. at 430 n.6 (statistical disparities alone, which showed nothing more than racial disproportionate effect of high school graduation requirement, proved disparate impact without taking into account other possible legitimate causes of disparity); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) (showing that tests select applicants in racial pattern significantly different from applicant pool is sufficient to shift burden to defendant to prove business necessity); *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977) (prima facie case established by showing facially neutral height requirement screened out women applicants in significantly discriminatory pattern, without considering other causes for statistical disparity); *Connecticut v. Teal*, 457 U.S. 440, 443 n.4, 445 (1982) (prima facie case of adverse impact, requiring employer to show practice is job-related, is made out by only a statistical showing of racial difference in

passing scores). In disparate impact cases, the evidence "usually focuses on statistical disparities ... and on competing explanations for those disparities." *Watson*, 487 U.S. at 987. *Watson* makes clear that sufficiently substantial statistical disparities may "raise an inference of causation." *Id.*, 487 U.S. at 995.

Following *Griggs*, the Courts of Appeals have also – until the Fourth Circuit's decision here – refused to impose an additional prima facie burden on disparate impact plaintiffs to account for other possible legitimate factors that could explain prima facie statistical disparities:

> *Berger v. Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395, 1411-12 (D.C. Cir. 1988) (statistical evidence tending to show that facially neutral employment criteria used to select applicants for hire or promotion resulted in racial pattern significantly different from applicant pool establishes prima facie case);
>
> *EEOC v. Steamship Clerks Union*, 48 F.3d 594, 603-07 (1st Cir. 1995) (statistics demonstrating race-based impact establish prima facie case);
>
> *Waisome v. Port Auth. of N.Y. & N.J.*, 948 F.2d 1370, 1372-73, 1377-79 (2d Cir. 1991) (reversing summary judgment because statistics offered by plaintiffs, which showed a disparate racial impact at particular stages of promotion process, were sufficient to establish causation);
>
> *Newark Branch, NAACP v. Town of Harrison*, 940 F.2d 792, 798-801 (3d Cir. 1991) (statistical comparison between racial composition of qualified persons in labor market and those in jobs at issue established disparate impact prima facie case);

Bernard v. Gulf Oil Corp., 841 F.2d 547, 560 (5th Cir. 1988) (to establish a prima facie case of adverse impact plaintiffs must demonstrate that job reclassification in labor agreement had adverse impact on blacks at a substantially and disproportionately higher rate than whites to deny opportunities for advancement);

Phillips v. Cohen, 400 F.3d 388, 399 (6th Cir. 2005) (proper comparison is number of protected group members receiving promotions with number seeking them contrasted with proportion of non-protected group);

Allen v. Seidman, 881 F.2d 375, 380 (7th Cir. 1989) (simple statistical comparison enough to support prima facie case of disparate impact where reasonably homogeneous applicant pool);

Hameed v. Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, 637 F.2d 506, 513-14 (8th Cir. 1980) (disparate impact prima facie case established by statistical evidence of test with racially disproportionate pass rates);

Bouman v. Block, 940 F.2d 1211, 1224-27 (9th Cir. 1991) (statistical evidence of pass rates of women and men compared to actual promotions established prima facie case of disparate impact);

Bullington v. United Air Lines, Inc., 186 F.3d 1301, 1313-15 (10th Cir. 1999) (applicant flow analysis showing gender disparity in passing interviews sufficiently reliable to defeat summary judgment despite not taking into account flight experience of pilots; possible weakness in statistics not so one-sided that defendant, which did not correlate missing factor with pass rates, must prevail as a matter of law; statistics could

still raise factual dispute to which defendant would have to show business necessity);

In re: Employment Discrimination Litigation Against the State of Alabama, 198 F.3d 1305, 1311-12, 1314-15 (11th Cir. 1999) (plaintiff can use statistical evidence to prove disparate impact prima facie case).

As the Fourth Circuit erred in deciding *Griggs* (*see* above at 8-10), it used the wrong statistical approach in *Bazemore*, also necessitating correction by this Court. It had rejected the plaintiffs' statistics for not taking into account pay increases that varied by county, which it assumed "*are bound* to have an effect on the salaries of the agents in the various counties," and had held that "appropriate" statistics "should . . . include *all* measurable variables *thought* to have *an effect* on salary level." *Bazemore*, 751 F.2d at 672 (emphasis added). When this Court reversed, it held that the Fourth Circuit's statistical analysis was "plainly incorrect." *Bazemore*, 478 U.S. at 400 (Brennan, J., concurring opinion adopted by unanimous Court, 478 U.S. at 388).

In petitioner's case, the Fourth Circuit has repeated the mistake it made more than twenty years ago in *Bazemore*, by dismissing petitioner's statistics because they did not take account of "factors such as presentation in the interview, answers to interview questions, demeanor, and ability demonstrated in the interview" that "*of course entered into the judgment* of the members of the Panel." (App. 30, emphasis added) As it was necessary in *Griggs* to correct the issue of intent, this Court should once again reaffirm the correct statistical standard of proof to be applied in the Fourth Circuit as it is everywhere else.

CONCLUSION

Because the decision below sets the Fourth Circuit at odds with this Court, the circuit courts and Congress in a critical area of discrimination law, this Court should grant the petition for *certiorari*.

Dated: New York, New York
November 7, 2005

Respectfully submitted,

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

VIRGINIA ANDERSON,
Plaintiff-Appellant,

and

SHERMAN T. LOTT; VERNELLE PAYTON; LARRY COLEMAN; AVA HAWKINS; CURTIS YOUNG; CLINTON EDWARDS, JR.; FRANCIS H. NEWMAN, JR.; SAMUEL QUILLER; PAMELA WADE; BENNIE BREELAND; GLENN STEPHENSON; KENNETH L. BRADY, SR.; CLYDE REED; ROBIN HOLMAN; JOHN L. NAYLOR; GWENDOLYN H. WATTS; ALTON BARNES; HAYWARD ERVIN; ALANA J. LEWIS; DEBRA A. WILLIAMS; JIMMIE LEE TURNER; WILLIAM BONAPARTE, JR.; JEFFREY A. MYERS; JOHNNY J. HOLMES; JAMES SHERMAN, III; DEBBIE S.G. POPE; CHARLES JONES; ANNIE B. LOTTABNEY; OLIVIA G. GAVIN; DIANE J. CRAWFORD; MAXINE S. WHITE; MARVIN MOORE; BERTHA LEGREE; IRMAGENE REED; WILLAR H. HIGHTOWER, JR.; JEFFREY A. BAILEY; CONSTANCE DORSEY; RYSON CARTER; RHONDA M. TILLER; PEGGY M. POLLOCK; CALVIN L. COOKS; GLORIA J. COLLINS; DANITA L. MYLER; PATRICIA LANGFORD; DELORES BEASLEY; MARY L. JOHNSON; MOSES MYERS; BENITA BASS; LINCHIE H. SIMMONS; WALTER DAISE; WANDA Y. SMITH; BERNARD NORA; CAROLYN W. THORPE; TOMMY A. CAMPBELL; DONALD F. BROOKS; LEWIS HOLSTON; DEITRA M. POUGH; ANGELA Y. HOLBROOK; PHYLLIS A. CALHOUNHURLEY; NORRIS V. ROUSE; URSULA D. GAY-FURSE; DEBRA GANTT; ELVIRA JOHNSON

No. 03-1150

WILLIAM R. HALL; SHARON M. CAMPBELL; WINSTON BUTLER; QUITMAN WHITE; LEON BAKER; LINDA B. BAKER; GEORGE BUSH; GARY L. CARTER; CURTIS COKER, JR.; DIANNE T. DAVIS; SANDRA HARRISON; CHARLOTTE JOHNSON; TYRONE DAVIS; MARINDA B. JOHNSON; JOHNNY KING; DELORES MARTIN; CLINTON L. MCCALLA; DOUGLAS MCKENZIE; MARILYN MCKIE; MARLENE L. MOORE; JAMES MOTON; GOLDIE S. RANDLE; THOMAS WILLIAMS; JOSEPH RIDEAUX; WILLIAM L. RYANS; DIANNE S. SCOTT; VERONICA SHAW; MICHAEL STALEY; CALVIN R. SUBER; GEORGE A. TAYLOR; ELLEN M. VESSEL; KENNETH E. VINSON; HOPE YARBOROUGH, for themselves and on behalf of all others similarly situated,

Plaintiffs,

v.

WESTINGHOUSE SAVANNAH RIVER COMPANY; THE BABCOCK & WILCOX SAVANNAH RIVER COMPANY, INCORPORATED; BRITISH NUCLEAR FUELS LIMITED SAVANNAH RIVER CORPORATION; BECHTEL SAVANNAH RIVER, INCORPORATED,

Defendants-Appellees.

NAACP LEGAL DEFENSE AND EDUCATION FUND, INC.,

Amicus Supporting Appellant,

EQUAL EMPLOYMENT ADVISORY COUNCIL; CHAMBER OF COMMERCE,

Amici Supporting Appellee.

VIRGINIA ANDERSON,
Plaintiff-Appellant,

v.

WESTINGHOUSE SAVANNAH RIVER COMPANY
Defendant-Appellee,

and

BECHTEL SAVANNAH RIVER, INCORPORATED; THE BABCOCK & WILCOX SAVANNAH RIVER COMPANY, INCORPORATED; BRITISH NUCLEAR FUELS LIMITED SAVANNAH RIVER CORPORATION,
Defendants.

No. 03-1151

NAACP LEGAL DEFENSE AND EDUCATION FUND, INC.,
Amicus Supporting Appellant,

EQUAL EMPLOYMENT ADVISORY COUNCIL; CHAMBER OF COMMERCE,
Amici Supporting Appellee.

Appeals from the United States District Court
for the District of South Carolnia, at Aiken.
Cameron McGowan Currie, District Judge.
(CA-98-2075-1-23-BC; CA-00-1667-1-23-BC)

Argued: October 29, 2003.

Decided: May 4, 2005.

Before WIDENER, NIEMEYER, and GREGORY, Circuit Judges.

Affirmed in part, vacated in part, and remanded with instructions by published opinion. Judge Widener wrote the opinion. Judge Niemeyer wrote a separate opinion

concurring in part and dissenting in part. Judge Gregory wrote a separate opinion dissenting in part.

COUNSEL

ARGUED: Ivan D. Smith, VLADECK, WALDMAN, ELIAS & ENGELHARD, P.C., New York, New York, for Appellant. Glen David Nager, JONES DAY, Washington, D.C., for Appellees. **ON BRIEF:** Julian R. Birnbaum, VLADECK, WALDMAN, ELIAS & ENGELHARD, P.C., New York, New York; Ray P. McClain, RAY P. MCCLAIN, ATTORNEY, P.A., Charleston, South Carolina; BROWN & MULRAIN, L.L.P., New York, New York, for Appellant. Deborah A. Sudbury, Douglas M. Towns, JONES DAY, Atlanta, Georgia; Shay Dvoretzky, JONES DAY, New York, New York; Kenneth E. Young, NELSON, MULLINS, RILEY & SCARBOROUGH, Greenville, South Carolina, for Appellees. Elaine R. Jones, Director-Counsel, Norman J. Chachkin, Robert H. Stroup, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., New York, New York, for Amicus Curiae NAACP. Stephen A. Bokat, Robin S. Conrad, Ellen Dunham Bryant, NATIONAL CHAMBER LITIGATION CENTER, INC., Washington, D.C.; Ann Elizabeth Reesman, Katherine Y.K. Cheung, MCGUINESS, NORRIS & WILLIAMS, L.L.P., Washington, D.C., for Amici Curiae Council and Chamber.

OPINION

WIDENER, Circuit Judge:

In this Title VII case, plaintiff Virginia Anderson appeals from the district court's orders denying class certification, granting the defendants' motions in limine,

and granting summary judgment to the defendants. We generally affirm the district court, but remand for consideration of whether [the] class should be certified with a new lead plaintiff.

I.

Virginia Anderson is a black female employed at the Department of Energy's Savannah River Site. The Savannah River Site is managed for the Department of Energy by Westinghouse Savannah River Company, LLC (Westinghouse). Bechtel Savannah River, Inc., (Bechtel), Babcox & Wilcox Savannah River Company (B & W), and British Nuclear Fuels Ltd. Savannah River Corporation (BNFL) also participate in the management of the Savannah River Site pursuant to a contract with the Department of Energy. Each company is a defendant in this action.

In the past, the Savannah River Site produced materials needed for the fabrication of nuclear weapons, but its current mission is focused on environmental cleanup and processing radioactive materials. The Savannah River Site covers 310 square miles in western South Carolina, and, in 1999, over 13,000 employees worked at the sites for the four defendants. Of those employees, 2765 were black.

Virginia Anderson began working at the Savannah River Site in 1978 as a typist in a typing pool. Miss Anderson became a stenographer a year later. She worked as a stenographer in several different departments at the Savannah River Site until 1989. In 1989, Miss Anderson became an administrative secretary in the materials technology group. The transition from stenographer to administrative secretary was a promotion for Miss Anderson, and, as an administrative secretary, she had more responsibilities. As an administrative secretary, Miss

Anderson received a salary at the SGL 16 level. Miss Anderson remained with the materials technology group until July of 1998. In August of 1998, she received a promotion to administrative assistant in the university relations group within the chemicals hydrogen technology group. With her promotion, Miss Anderson's salary level increased to SGL 28 SOP. SOP stands for selective overtime positions, and, as a SGL 28 SOP employee, Miss Anderson received additional compensation above her salary if she worked a certain number of hours above her normal working hours. Miss Anderson remained with the university relations group through the time she filed her lawsuit against the defendants.

When she began working at the Savannah River Site, Miss Anderson's higher educational background was limited to an executive secretary diploma from Augusta Tech, which she received in 1977. During her tenure at the Savannah River Site, Miss Anderson pursued further higher education degrees. In 1996, Miss Anderson took her bachelor of science degree in human resources management from Southern Wesleyan University. In June of 1998, Miss Anderson received her masters in business administration from Nova Southeastern University. Miss Anderson's promotion from administrative secretary, with a pay level of SGL 16, to administrative assistant, with a pay level of SGL 28 SOP, came just months after she received her M.B.A.

In the 1990's, the Savannah River Site instituted two programs, one for promotions and one for merit pay increases, that are at issue in this litigation. The first is the Competency Based Posting System, or CBPS. The Competency Based System is an application and promotion system which Savannah River Site employees may

use to apply for new positions and promotions. Under the system, exempt or non-exempt employees may apply for any posted position that is available, with a few exceptions. According to the description contained in Westinghouse Savannah River Company 5B Manual, the hiring and promotion process under the Competency Based System is as follows:

1. Open position is submitted to HR for posting.

   The hiring manager ensures the position description is complete and correct; adding, and weighing the values of, necessary competencies. HR Compensation establishes the salary grade of the position at or below the salary grade of the previous incumbent (if any). No preferred candidates exist in this system.

2. HR posts the position in ShRINE (sic) for ten working days.

3. The hiring manager establishes an interview panel.

   With the HR lead, the hiring manager selects appropriate individuals, based on their job knowledge and familiarity with the position, to sit on an interview panel. The panel consists of three members, one of whom must always be the hiring manager.

4. Self-nominating individuals submit their qualifications to HR-Staffing.

   Submitted qualifications can include a Personal History form (OSR 27-13) and/or resume.

5. Individuals nominated by others submit their qualifications to HR-Staffing.

   With their consent, candidates can be nominated by others. Nominations are not restricted to managers. The hiring manager cannot nominate. Candidates submit a Personal History form (OSP 27-13) or resume and copies of their last three performance appraisals to HR-Staffing.

6. HR confirms that applicants meet posted position requirements.

   Eligible candidates are identified based on minimum requirements listed in the position profile.

7. HR-Equal Employment Opportunities (EEO) reviews the list of applicants for consistency with corporate and affirmative action planning.

8. HR-Staffing submits eligible applicants to the hiring manager.

9. Within five working days of receiving the material from HR-Staffing, the hiring manager selects candidates for interviews.

10. All applicants are informed of the status of their application.

11. Individuals selected for an interview receive a candidate information package regarding the interview process.

12. The hiring manager schedules and conducts, with the panel, interviews within 10 working days after candidates are notified of their status.

13. The hiring manager selects the candidate who best meets position requirements.

    The final decision is made by the hiring manager with input from the other two interview panel members and after review by the HR lead. The next level of management must also review and approve the selected candidate.

14. HR-EEO review candidate selection for consistency with corporate and affirmative action planning.

15. If a promotion is necessary, HR-Compensation, HREEO, and the division HR lead review the decision to ensure that all relevant criteria are met.

16. HR-Staffing prepares a formal offer and the hiring manager extends the offer to the candidate.

17. The candidate accepts or rejects the offer within two calendar days.

18. The hiring manager informs all interviewed candidates and the sending manager of the selected candidate of the selection process outcome.

19. The selected candidate is released to the new position within four weeks of acceptance.

    If the releasing manager and the hiring manager both agree, the release time-frame can be shortened. The release time-frame cannot exceed four weeks.

Under the Competency Based System, hiring managers can evaluate applicants in six core competencies: teamwork, leadership, communications, business results, self-management, and employee development. The hiring managers can also evaluate applicants using selected functional competencies that are specific to the position for which the manager is hiring. For example, a particular functional competency could be "[p]roficient in heating, ventilation and air-conditioning design," and the CBPS manual explains that "[f]unctional competencies can be derived from the responsibility section on the job description." Each competency is assigned a weight, using a number from one to five, in which five is "[m]ost important relative to other competencies" and one is "[l]east important relative to other competencies." The interview panel then selects candidates for interviews and then interviews each selected candidate.

Each applicant who is interviewed is evaluated by the interview panel using the core and functional competencies. The interview panel determines a weighted score for each applicant on each core and functional competency. The panel determines the weighted score by multiplying the weight given to each competency (one to five) by the applicant's rating for each competency. The panel rates the applicant on a scale of one to five, with a five meaning "[d]emonstrates exceptional competence" and a one meaning "[d]id not demonstrate expected level of competence." The panel determines the applicant's total weighted score by adding together the weighted scores for each competency. The hiring manager then selects the candidate for the position, after noting the total weighted scores for each candidate, and records the basis for selecting the chosen candidate.

The second program instituted at the Savannah River Site was the Ranked Performance Pay Process, or RP3. The Site began using the program in 1997 to rank exempt and selected overtime position employees for merit increases in salary. Two major factors are utilized under the RP3 system to determine which employees should receive merit raises. Job performance constitutes 75% of the ranking given to an employee, and the remaining 25% is derived from rankings on Site Imperatives. Site Imperatives "are the basis of how we [Site employees] each are expected to accomplish the business objectives of our work group, division, and company as a whole." The five Site Imperatives are safety, disciplined operations, cost effectiveness, continuous improvement, and teamwork. Each Site Imperative is weighted five percent in the total ranking, with the total for all five constituting 25% of an employee's final ranking.

Under the RP3 system, each manager must use the RP3 electronic evaluation worksheet to rate each employee in the manager's organization. The evaluation process begins with the smallest unit of organization, the department or section. Once the initial rankings are computed for the department or section, all employees within a single work group are ranked by the next level of management. At the next step, the rankings for a division, each division's manager may integrate the work group rankings to achieve a ranking of employees within the division. The division manager may rank all employees in various combinations. Among the combinations suggested by the RP3 system manual are (1) total ranking of all employees; (2) rank within separate work groups; (3) managers, leads, and professionals; (4) salary grade clusters, i.e., all SGL 16 employees or all SGL 32 to 34

employees; or (5) managers, leads, and professionals by salary grade clusters.

The employee rankings for each division are then broken into performance categories consisting of the high 15%, the middle 80%, and the low five percent. Final rankings are approved by the division manager, and merit salary increases are awarded based on each division's budget and salary guidechart. The Human Resources Compensation department must approve any merit increases that are outside of the salary guidechart. All employees, regardless of their ranking percentage, are eligible for merit increases, but the top 15% may receive the highest merit increases. Another factor that contributes to the size of a merit increase is whether the employee is above or below the mid-point of their salary grade. For example, if an employee is an A performer whose salary level is below the midpoint of his salary grade, he is eligible to receive a merit increase, the amount of which may be different if he is an A performer whose salary level is above the midpoint of his salary grade.

In ranking their employees for job performance, which accounts for 75% of an employee's ranking, the RP3 manual instructs managers to consider the following factors:

Job expectations
Quality and quantity of work
Position scope (performance against position description)
Support to achieving commitments
Feedback from others (managers, peers, or customers)

Awards, recognition
Performance standards (leadership, judgment)

For job performance, an employee receives a rating of either "Low," meaning "[c]onsistently performs at a level below expectations," or "Mid," meaning "[c]onsistently performs at the level of expectations," or "High," meaning "consistently performs at a level that exceeds expectations." Managers also use the low, mid, or high rankings to evaluate their employees in the five Site Imperatives. The RP3 manual lists the performance indicators that managers should use when determining whether an employee should receive a low, mid, or high rank for each imperative.

In her lawsuit, Miss Anderson complains about three separate instances in which she sought and subsequently failed to receive a promotion. In 1997, Miss Anderson applied for the position of Administrative Assistant in the Environmental Restoration Division. The hiring manager, Miss Gail Toddings, posted the opening using the CBPS, and approximately 150 employees applied for the position. After the Site's Human Resources department evaluated the applications, 30 to 40 resumes were sent to Miss Toddings. The outgoing administrative assistant, Miss Laboris Curry, assisted Miss Toddings in evaluating the resumes and choosing 15 people to interview. Miss Toddings made the final decision on who would be interviewed. Miss Anderson was selected for an interview, and she interviewed for the position on December 15, 1997, before an interview panel chaired by Miss Toddings. The interview panel recommended and Miss Toddings selected Mrs. Linda Clarke for the position. Mrs. Clarke, a white

woman, received the highest consensus rating, a score of 190, among all of the employees who were interviewed.[1] Miss Anderson received a rating score of 136, the second-lowest score given by the interview panel. The interview panel gave its lowest rating score of 129.5 to a white female employee.

In 1998, Miss Anderson applied for the position of Administrative Assistant in the Business Development and Community Outreach Division. Miss Anderson was not selected for an interview on the basis of her low scores for the functional competencies of the position. Only two applicants received higher scores in core competencies than Miss Anderson, but eight applicants had higher ratings in the functional competencies. Miss Anderson received a rating of 59 out of a possible 72 for core competencies and a rating of 9 out of a possible 57 for functional competencies, for a total rating of 68. In contrast, the individual chosen for the promotion, Mrs. Brenda Pearson (formerly Miss Brenda Boggs), a white woman, received a rating of 60 out of a possible 72 for core competencies and a rating of 57 out of a possible 57 for functional competencies, for a total rating of 117. Mrs. Pearson received the promotion, and Miss Anderson did not.

Miss Anderson also alleges that she was denied a promotion from SGL 28 SOP to SGL 30 while in her position as administrative assistant in the university relations group. She complains that she was told she had to work in her current position for two to four years before

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[1] 190 was the highest rating among the employees interviewed for the position. Mrs. Clarke and another employee, Miss Shirley King, both received scores of 190. (JA 11107-11108, 11115-11116) Miss King is a white woman. (JA 11169)

she could receive a promotion in place. She contends that white employees received promotions in place without having to work in their positions for two to four years.

II.

This lawsuit began on October 31, 1997, when ten black Site employees filed a class action lawsuit against the defendants. The ten plaintiffs brought claims under 42 U.S.C. § 1981 and Title VII alleging that the defendants denied black employees promotions on an equal basis with white employees, maintained salary discrepancies between black and white employees, denied black employees access to training opportunities on an equal basis with white employees, demoted black employees on the basis of their race, and discriminated against black employees by keeping them in less desirable positions. The ten plaintiffs also brought individual claims for disparate treatment on the basis of race. Miss Anderson later joined the lawsuit as a plaintiff, and a total of 99 individuals became plaintiffs.

The plaintiffs sought to certify a class consisting of all current and former black employees of the defendants who worked at the Site who had been or will be subject to discrimination by the defendants. After oral argument was held on the class certification motion, the district court denied the motion "as to the proposed class or any subclass suggested by Plaintiffs." The district court determined that the plaintiffs' "across the board" challenges to the defendants' employee practices did not satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure and were not supported by governing Supreme Court and Fourth Circuit case law.

After denying the plaintiffs' motion for class certification, the district court ordered the plaintiffs to pursue their claims individually. Following the district court's instruction, Miss Anderson filed an amended complaint on July 26, 2000. In her complaint, she brings claims for disparate impact discrimination, relating to the defendants' use of the CBPS and RP3 systems and to the defendants' pay practices, and claims for disparate treatment, relating to the three promotions she did not receive.

The district court held an evidentiary hearing after ruling on the motions for class certification. At issue in the hearing was the proposed testimony of Dr. Edwin L. Bradley, the plaintiff's prospective expert witness. After listening to testimony and argument, the district court excluded from evidence Dr. Bradley's proposed expert opinion testimony on the discriminatory impact of the RP3 system. The district court excluded this testimony on the grounds that it was based on statistical research and analysis that did not have proper controls. Dr. Bradley had conducted several studies regarding the RP3 system. In several instances, Dr. Bradley's statistical analysis compared black and white employees under the RP3 ranking system without taking into account any differences in their job titles or position. The district court also excluded from evidence a draft copy of an assessment of Westinghouse's equal employment opportunity, human resources, and employee concerns programs conducted by the Department of Energy.

The district court granted the defendants' motion for summary judgment as to Miss Anderson's individual disparate impact and disparate treatment claims. The district court denied the defendants' motion for summary judgment as to Miss Anderson's disparate treatment pay

claim, but Miss Anderson had the remaining claim dismissed with prejudice so that she could pursue this appeal.

III.

We review the district court's grant of summary judgment to the defendants de novo, viewing the facts and all reasonable inferences drawn therefrom in the light most favorable to Anderson. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Williams v. Giant Food Inc.*, 370 F.3d 423, 428 (4th Cir. 2004). Summary judgment should only be granted when there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); *Walton v. Greenbrier Ford, Inc.*, 370 F.3d 446, 449 (4th Cir. 2004).

IV.

The district court denied the motion for class certification on July 19, 2000. In its order and opinion denying class certification, the district court directed the 99 plaintiffs to proceed with their cases on an individual basis. The district court found that

> not one single named Plaintiff in the proposed class asserts claims involving all of the programs attacked; rather, the pattern is one of combinations and permutations of some Plaintiffs on some claims and different combinations and permutations of Plaintiffs on other claims, etcetera.

Slip op. at 48. The district court cannot certify a class action in which the class representative is not part of the

class and does not "'possess the same interest and suffer the same injury' as the class members." *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 338 (4th Cir. 1998) (quoting *E. Tex. Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977)).

On appeal, Anderson argues that the district court should have certified two subclasses of black employees with disparate impact claims involving the Competency Based Posting System and the Ranked Performance Pay Process. In its opinion denying the plaintiffs' motion for class certification, the district court noted that the plaintiffs' proposed subclasses, if they had been raised in a timely fashion instead of as part of the plaintiffs' motion for reconsideration of the district court's ruling on class certification, would be denied because of the failure of the proposed classes to satisfy the requirements of commonality and typicality.

After denying the plaintiffs' motion for class certification, the district court held a hearing to consider evidentiary issues. At the conclusion of the hearing, the district court granted the defendants' motion to exclude the opinion of the plaintiffs' expert, Dr. Edwin L. Bradley, about the RP3 rankings and about merit increases under the RP3 system. Miss Anderson appeals from the district court's ruling on the admissibility of this evidence. We address these contentions first.

V.

We review a district court's decision to admit or exclude expert evidence under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), for abuse of discretion. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 138-39

(1997). If the district court makes an error of law in deciding an evidentiary question, that error is "by definition an abuse of discretion." See *Hunter v. Earthgrains Co. Bakery,* 281 F.3d 144, 150 (4th Cir. 2002). In Daubert, the Supreme Court explained that the previous test for the admissibility of "novel scientific evidence" based on *Frye v. United States,* 293 F. 1013 (D.C. Cir. 1923), was superseded by the adoption of the Federal Rules of Evidence. *Daubert,* 509 U.S. at 585-589.

Rule 702 of the Federal Rules of Evidence provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702. When a party seeks to admit any expert testimony, the district court's obligation is "gatekeeping." See *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 141 (1999). As the gatekeeper, the district court should analyze the proposed expert testimony using several factors, including whether the expert opinion can be tested and whether it has been subjected to peer review. *Daubert,* 509 U.S. at 592-94. The district court should also consider the rate of error of the methods employed by the expert, the existence and maintenance of standards used in the expert's methods, and whether the expert's methods have been generally accepted by his or her respective community.

Daubert, 509 U.S. at 594; see also *United States v. Crisp*, 324 F.3d 261, 265-66 (4th Cir. 2003) (listing *Daubert* factors to be applied in analyzing expert testimony).

Miss Anderson sought to introduce into evidence Dr. Bradley's testimony about the differences in RP3 ratings given to blacks as compared to those given to whites. The report upon which this testimony would be based showed that for the years 1998 and 1999 the number of standard deviations between the RP3 rankings given to black exempt employees and white exempt employees was -2.61 and -2.14, respectively. In making the comparisons, Dr. Bradley controlled the analysis using job groups. In other words, Dr. Bradley's analysis showed that, using the job groups as the category in which employees are grouped, that whites had higher RP3 rankings than blacks.[2] The district court found this analysis wanting.

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[2] Dr. Bradley's testimony also would have relied on nine other studies that also failed to properly compare employees in similar job positions and titles. Several of Dr. Bradley's studies did not have any controls to ensure that the percentage of high RP3 rankings and merit increases awarded to African-Americans was not influenced by other factors or by comparing dissimilar employees. Other studies reviewing merit increases controlled for ranking received or for race and ranking but not for the actual factors that comprise the ranking or for the different job responsibilities that workers in different divisions may have. Five of Dr. Bradley's studies involving RP3 rankings compared workers only by division, but, within a division, there are many distinct types of positions with different responsibilities.

In *Herold v. Hajoca Corp.*, 864 F.2d 317, 321-22 (4th Cir. 1988), we upheld the district court's ruling to exclude statistical evidence that did not compare the plaintiff with others who were similarly situated to the plaintiff. In *Herold*, plaintiff sought to introduce statistical evidence derived from the number of employees terminated in the company's entire mid-Atlantic region in order to establish a violation of the ADEA. We upheld the district court's refusal to allow such "region-wide

(Continued on following page)

The district court found that "the studies are deficient because they use the EEO job groupings." During the hearing, Dr. Bradley testified that job groups could contain numerous and diverse occupations. For example, Dr. Bradley admitted under questioning that a single job group could contain 147 separate individual job titles and up to seven separate pay grades. Dr. Bradley also testified that a single job group could contain the following job titles: optician, counsel, physician, and psychologist. Furthermore, under the guidelines for managers using the RP3 system to rate employees, the managers are instructed that "[t]he single most important component of any employee's overall performance involves the completion of their individual job-related responsibilities. This factor is weighted 75% of the total evaluation." Those instructions also note that the "[r]equirements of each job are often unique -- there is not a single standard by which all employees can be measured." According to Savannah River Site employment policies, the RP3 ranking system is to be utilized to determine merit raises for employees within a single division. In 1998 and 1999, the Savannah River Site had at least 18 separate divisions, and the RP3 system was to be used to rank employees for merit raises within, and not across, each division.

Dr. Bradley's studies utilized various controls, i.e. job group, job performance categories, division, EEO job category, adjusted years of service, FLSA group. The studies, however, failed to compare simiarly situated

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statistics" to be admitted. Instead, the district court permitted the plaintiff to introduce statistical evidence derived only from the terminations of employees at the defendant's Staunton branch, where the plaintiff had been employed. 864 F.2d at 321-22.

workers at the Savannah River Site. In *Smith v. Virginia Commonwealth University,* 84 F.3d 672, 676-77 (4th Cir. 1996) (en banc), we noted that regression analysis utilized in the employment discrimination context "must include all the major factors" which influence the challenged action, such as ratings or pay. (emphasis in original). The plaintiffs in *Smith* were five male professors at Virginia Commonwealth University who brought a lawsuit under Title VII to challenge pay raises given to female faculty members after the university conducted a salary equity study. 84 F.3d at 674. In *Smith,* we reversed the district court's grant of summary judgment because the district court relied on regression analyses that failed to include all major factors that influence the salaries of professors. 84 F.3d at 676. We also explained that

> [a]lso at issue is the fact that the study included male faculty members who had returned from higher paying positions in the VCU administration but kept the higher salary. The study did not account for this salary differential. This, according to the appellants, leads to an illogical comparison involving an inflated pool of faculty members; eighty-five percent of the faculty whose salaries were increased because of prior service as administrators were male. An inflated pool can undermine the validity of a statistical study to determine imbalances.

84 F.3d at 677 (footnote deleted). The study relied upon by the university was deficient because it failed to properly compare the salaries of male and female professors using the criteria that the university utilized to award raises. See *Smith,* 84 F.3d at 676-77 (noting that VCU used performance, productivity, and merit to award prior raises

and that these factors were not considered in the salary equity study).

The study used by VCU attempted to compare the salaries paid to male and female professors. As professors, whether male or female, the faculty at VCU was employed to teach and conduct research. The salary equity study, though deficient, compared the salaries paid to members of the same profession. Dr. Bradley's studies, however, evaluate the RP3 ranking process by using not a single job title for comparison, such as professor, but by using job groups. As he admitted during the evidentiary hearing, his study utilized results from a job group, which could include diverse jobs such as counsel, optician, physician, and psychologist. The ratings for performance as a counsel may be different from those for a physician, even if the counsel and physician being compared are of the same race.

We are of opinion and hold that the district court did not abuse its discretion in excluding Dr. Bradley's testimony based on his statistical analysis. The analysis was based on comparisons that were not relevant to Miss Anderson's claims. "The usefulness of statistics depends on the surrounding facts and circumstances." *Carter v. Ball*, 33 F.3d 450, 456 (4th Cir. 1994) (citing *Int'l Broth. of Teamsters v. United States*, 431 U.S. 324, 340 (1977)).

The district judge stated briefly and clearly the reasons for her decision, with which we agree:

> THE COURT: All right. The court grants the motion in limine. The court finds that the studies are deficient because they use the EEO job groupings. And the witness has conceded that the rating forms differ within the EEO job groupings,

> and he made no analysis of the difference in the rating schemes for jobs within the EEO job groupings, nor what the purpose of the EEO job groupings was from the point of view of its decision to group certain kinds of job categories together for that purpose.
>
> That purpose seems to have nothing to do with actual job performance or job requirements. And in order to evaluate whether or not there is disparate impact in ratings, similarly situated persons who are being rated must be compared. And there is simply too much disparity in the groups that have been used to control, and an absence of the use of a control factor that would control for the actual job title or the job duties.
>
> And it does appear to me – and I believe the witness has conceded that that could have been done and was not controlled for, and for that reason the court grants the motion.

VI.

Miss Anderson also challenges the district court's decision to exclude a report prepared by the Department of Energy. We review a district court's decision to exclude such evidence for abuse of discretion. *United States v. Gray*, 852 F.2d 136, 139 (4th Cir. 1988). As we noted above, a district court abuses its discretion if it makes an error of law in deciding whether to admit or exclude evidence. See *Hunter*, 281 F.3d at 150.

Anderson sought to introduce as evidence an assessment entitled "Department of Energy's Assessment of Westinghouse Savannah River Company's Equal Employment Opportunity Human Resources and Employee

Concerns Programs." The Department of Energy assessed the Savannah River Site's equal employment opportunity and diversity programs in 2000 and submitted a draft of its assessment to Westinghouse. The assessment is not final, and it is stamped "DRAFT" on the first page. Furthermore, the contents page and the first page of Section IX (Employee Concerns Programs), which is uncompleted, state that Section IX is "to be completed later." As of March 2002, Westinghouse had not received a final version of the assessment.

The district court granted the defendants' motion to exclude the assessment on the grounds that it suffered from multiple levels of hearsay and was not within the exception under Federal Rule of Evidence 803(8). The district court also noted that the assessment was a draft, not a final report, and that the limited probative value of the draft was "far outweighed by the numerous trustworthiness concerns . . . coupled with the risk of unfair prejudice based on inclusion of allegations of events that may have nothing to do with a given Plaintiff or Defendant." Rule 803(8) of the Federal Rules of Evidence excepts from the hearsay rule reports compiled by "public offices or agencies" in compliance with the office or agency's duty under law "unless the sources of information or other circumstances indicate lack of trustworthiness." Fed. R. Evid. 803(8). In *Distaff, Inc. v. Springfield Contracting Corp.*, 984 F.2d 108, 111 (4th Cir. 1993), we explained that an investigative report may be admissible under Rule 803(8) if its contents are trustworthy. See also *Zeus Enters., Inc. v. Alphin Aircraft, Inc.*, 190 F.3d 238, 241 (4th Cir. 1999) ("The admissibility of a public record specified in the rule is assumed as a matter of course, unless there are sufficient negative factors to indicate a lack of trustworthiness, in

which case it should not be admitted."). Courts may look to several factors to determine if the report is admissible: "(1) the timeliness of an investigation; (2) the special skill or experience of the official; and (3) possible motivational problems." *Ellis v. Int'l Playtex, Inc.*, 745 F.2d 292, 300-01 (4th Cir. 1984). The *Distaff* court noted several factors which may reveal a lack of trustworthiness, namely "unreliability, inadequate investigation, inadequate foundation for conclusions, (and) invasion of the jury's province." 984 F.2d at 111 (citing Weinstein, *Weinstein's Evidence*, § 803(8)).

A review of the factors listed above reveals that the district court did not abuse its discretion in excluding the assessment. The Department of Energy's investigation began in 2000 and was not completed by March of 2002. The draft assessment contains multiple levels of hearsay as well as referring to a complaint from an individual who is a plaintiff in a companion case to this lawsuit (one William Hall). The assessment does not have an adequate foundation for its conclusions. The assessment team from the Department of Energy sought to document employee perceptions about equal opportunity programs, but the team only interviewed employees who responded to an open invitation sent by email. Those who were interviewed constituted less than one percent of the workforce at the Savannah River Site. The assessment team admitted in its report that it "did not attempt to verify the perception of the employees" who were interviewed. In analyzing the racial composition of interview panels, the assessment team based its statistics on a review of 30 interview panels. During the 21-month period from which those 30 panels were chosen, the Savannah River Site utilized about 900 panels to select candidates for new positions. Of

those 900 panels, the assessment team thus reviewed the racial composition of only 3.3% of the panels.

The admissibility of a report under Rule 803(8) is "permissive and not mandatory." *United States v. Gray*, 852 F.2d 136, 139 (4th Cir. 1988). In *Gray*, we held that the district court did not abuse its discretion by refusing to admit under Rule 803(8) an internal IRS report which was a "tentative internal report." 852 F.2d at 139. Furthermore, the risk of unfair prejudice from information contained in the IRS report far outweighed its probative value. Based on the fact that the Department of Energy's assessment was only a draft report and noting the concerns which we have mentioned, which are evidence of the assessment's lack of trustworthiness, we are of opinion and hold that the district court did not abuse its discretion in excluding the assessment.

VII.

A.

Following the district court's order denying class certification, Miss Anderson proceeded with her lawsuit individually. In her Fourth Amended Complaint, Miss Anderson claims that the RP3 ranking system and the CBPS have a disparate impact on black employees on the basis of race. On appeal, Miss Anderson challenges the district court's decision granting summary judgment to the defendants on her disparate impact claims.

We look first at Miss Anderson's claim that the RP3 ranking system has a disparate impact on black employees. To establish a prima facie case of disparate impact discrimination under Title VII, a plaintiff must "show that the facially neutral employment practice had a significantly

discriminatory impact." *Walls v. City of Petersburg*, 895 F.2d 188, 191 (4th Cir. 1990) (citing *Connecticut v. Teal*, 457 U.S. 440, 446 (1982)). If a plaintiff establishes a prima facie case, "the employer must then demonstrate that 'any given requirement [has] a manifest relationship to the employment in question,' in order to avoid a finding of discrimination." *Teal*, 457 U.S. at 446-47 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)). "Even in such a case, however, the plaintiff may prevail, if he shows that the employer was using the practice as a mere pretext for discrimination." *Teal*, 457 U.S. at 447.

In establishing a prima facie violation of Title VII, a plaintiff may use statistical evidence. See *Walls*, 895 F.2d at 191 (citing *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 584 (1979)). In this case, the district court excluded Dr. Bradley's testimony based on statistical evidence which we have affirmed. In her brief, Miss Anderson acknowledges that she cannot prevail on her disparate impact claim involving the RP3 system without Dr. Bradley's testimony. Miss Anderson did not address her RP3 disparate impact claim in her brief except to note that she wishes to pursue the claim if the district court's evidentiary ruling on Dr. Bradley's testimony is reversed. We have affirmed the district court's evidentiary ruling, and our affirmance admittedly forecloses Miss Anderson's chance for success on her RP3 disparate impact claim.[3]

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[3] Miss Anderson withdrew her RP3 disparate impact claim after the district court excluded Dr. Bradley's testimony based on his statistical evidence. As a result, although she pursued this claim on appeal, her success is dependent on our decision on the evidentiary issue.

B.

We next address Miss Anderson's disparate impact claim involving the CBPS. On appeal, she argues that the district court erred by concluding that she had not established causation and by requiring her to prove intentional discrimination instead of a disparate impact claim. We review de novo her challenge to the district court's order granting summary judgment. *Williams*, 370 F.3d at 428.

Miss Anderson contends that two aspects of the CBPS have a disparate impact on black employees. First, she challenges the stage in the CBPS where applicants are selected for an interview, and, second, she challenges the stage where the interview panel chooses the candidate for the position after an interview. These steps are listed as #9, #12, and #13 in the description of the CBPS found on pages 8-9 of this opinion. Miss Anderson objects to the alleged subjectivity inherent in these steps in the CBPS.

By her identification of these steps in the CBPS, we assume, arguendo, that Miss Anderson has complied with the Court's instruction that a plaintiff in a disparate impact case must identify the specific employment practice that is being challenged. See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988) (plurality opinion). Next, Miss Anderson must prove causation. 487 U.S. at 994. She must show that the above-mentioned practices caused a disparate impact on black employees at the Site.

To establish causation, Miss Anderson relies on statistical evidence provided by Dr. Bradley about the CBPS. She argues that Dr. Bradley's statistical evidence ruled out the possibility that chance caused a disparate impact on black employees. Dr. Bradley had analyzed the percentage of black employees who were successful under

the CBPS at three stages: (1) selection as qualified for a position from all candidates who apply; (2) selected for an interview from all qualified candidates; and (3) selected for the position from all interviewed candidates. Dr. Bradley compared the percentage of black employees who actually succeeded at each level with the percentage which he expected to succeed, based on the percentage of black employees at the Site. He found that the percentage of black applicants who actually succeeded at each step was much lower than he expected. From that evidence, which does not account for any other variables, Miss Anderson argues that causation is proven.

We do not agree. This evidence does not show that the reason black applicants failed to proceed at the interview selection stage and position selection stage was their race. Factors such as presentation in the interview, answers to interview questions, demeanor, and ability demonstrated in the interview of course entered into the judgment of the members of the panel as to the candidate who received a position that was being filled. And, at the interview selection stage, for example, education and experience are two factors that Dr. Bradley's analysis fails to quantify.

Furthermore, at each of the two stages which Miss Anderson challenges in the CBPS, the discretion of the person or panel making the decision is not unfettered. At each step, the decision maker must look to the core competencies listed in the CBPS manual and the specific functional competencies, which are chosen specifically for each position. At the interview stage, a panel of three interviewers must evaluate the candidate and must address each core and functional competency. The cases on which Miss Anderson relies to support her claim that causation has been proven involves supervisors who possessed

unfettered discretion to make employment decisions. See *Watson*, 487 U.S. at 990 (noting that Title VII should apply to "an employer's undisciplined system of subjective decisionmaking"); *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 287 (2d Cir. 1999) (noting that challenged promotion policy directed managers "to hire the most qualified candidate, but no other instructions are given" and that managers have unfettered discretion over hiring for certain positions); *Mozee v. Am. Commercial Marine Serv. Co.*, 940 F.2d 1036, 1042 n.6 (7th Cir. 1991) (explaining that promotion to the position of leadman, which was a prerequisite to a promotion to management, "was left entirely to management's discretion, since it fell outside the seniority bidding system applicable to most hourly employment positions"); *Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1424 (9th Cir. 1990) (noting that "Wells Fargo admits that the process of job elimination and restaffing was otherwise discretionary and subjective"). The decision makers at the Site were required to comply with the CBPS, which, through the use of core and functional competencies against which all applicants must be evaluated, limits the discretion available to decisionmakers. Accordingly, the cases on which Miss Anderson relies are hardly supportive of her position, for the only relevant complaint she makes to the process is that the decision makers were white.

The district court did not bar from evidence Dr. Bradley's conclusion that there might be evidence of disparate impact in two hiring stages – the interview stage and the selection stage – and correctly rejected the claim that his conclusion that the preparation of the list of eligibles by the Human Resources department might be subject to a Title VII racial objection.

We assume for argument, without deciding, that Miss Anderson has shown a prima facie case because the district court did not bar Dr. Bradley's conclusions as to disparate impact with respect to the interview stage and the selection stage. So the question is whether the proffered circumstantial evidence of discriminatory impact is sufficient to satisfy the *McDonnell Douglas* framework of proof. *Murrell v. Ocean Mecca Motel, Inc.*, 262 F.3d 253, 257 (4th Cir. 2001). See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under this framework, the plaintiff must first establish a prima facie case of discrimination. Then the defendant must respond with evidence that it acted with a legitimate, nondiscriminatory reason. *Murrell*, 262 F.3d at 257. If the defendant makes this showing, then the plaintiff must "present evidence to prove that the defendant's articulated reason was pretext for unlawful discrimination." *Murrell*, 262 F.3d at 257. "Although the evidentiary burdens shift back and forth under the *McDonnell Douglas* framework, '[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all time with the plaintiff.'" *Murrell*, 262 F.3d at 257 (internal citation omitted).

As the district court correctly stated regarding the 1997 failure to promote disparate treatment claim, Miss Anderson "does not suggest that the comments recorded on her interview form are false or misleading representations of her actual interview responses." Slip op. at 5. Further, Miss Anderson failed to address her qualifications in terms of the disclosed weighted competency factors. Miss Anderson instead focuses on her claimed higher satisfaction of the minimum qualifications, such as her education level, an MBA as opposed to others with high

school education, her performance of more years of administrative secretarial duties, and her numerous awards and recognition, which exceeded recognition received by other interviewees. The district court found in its opinion that "[w]hile these may be the criteria by which Anderson believes she should have been judged, Anderson has not offered any evidence that WSRC or the particular individuals who made up the CBPS panel have, at any time, applied such a set of standards." Slip op. at 6. For these reasons, pretext is simply not shown as there is no evidence to support it regarding the 1997 claim.

Miss Anderson similarly fails to point to any evidence that would support the conclusion that she deserved a higher rating on any of the areas evaluated for the 1998 promotion to administrative assistant. She also fails to provide any evidence that the panel overlooked evidence of her abilities in the areas contained in her application. Rather, as with the 1997 application, she focuses on her supposed greater qualifications in terms of total years of employment or education. Again, Miss Anderson has not proffered evidence to suggest that the legitimate reason offered by WSRC for its hiring decision is pretextual.

So pretext has not been shown for either the 1997 or 1998 claim and the decision of the district court is affirmed.

VIII.

We turn next to Miss Anderson's individual disparate treatment claims. Her first claim relates to her December 1997 application for the position of administrative assistant in the Environmental Restoration Division, Project Administration Department. Miss Anderson claims that

the defendants failed to promote her on the basis of her race. Linda Clarke, a white employee, received the promotion instead of Miss Anderson. Her claim is a disparate treatment claim.

To prevail on a disparate treatment claim for failure to promote, Miss Anderson must establish that she was treated less favorably because of her race. See *Int'l Broth. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977); *Carter v. Ball*, 33 F.3d 450, 456 n.7 (4th Cir. 1994). In order to establish a prima facie case of racial discrimination in promotions under § 1981 or Title VII, Miss Anderson must follow the burden-shifting framework outlined by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). See *Bryant v. Aiken Reg. Med. Ctrs. Inc.*, 333 F.3d 536, 544-45 (4th Cir. 2003).[4] Under the *McDonnell Douglas* framework, Miss Anderson can establish a prima facie case by showing that (1) she is a member of a protected group, (2) she applied for the position in question, (3) she was qualified for that position, and (4) the defendants rejected her application under circumstances that give rise to an inference of unlawful discrimination. See *Bryant*, 333 F.3d at 544-45; *Carter*, 33 F.3d at 458. If a prima facie case is established, the burden then shifts "to the employer to articulate some legitimate, nondiscriminatory reason" for the decision not to promote. *McDonnell Douglas*, 411 U.S. at 802; see *Bryant*, 333 F.3d at 545. After the employer states a reason for its decision,

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[4] The *Bryant* court noted that "[i]n failure-to-promote cases such as this, 'the framework of proof for disparate treatment claims . . . is the same for actions brought under Title VII, or § 1981, or both statutes.'" *Bryant*, 333 F.3d at 545 n.3 (quoting *Mallory v. Booth Refrig. Supply Co.*, 882 F.2d 908, 910 (4th Cir. 1989)).

Miss Anderson has the opportunity to show that the stated reason is a pretext for discrimination, see *McDonnell Douglas*, 411 U.S. at 804, and the trier of fact must determine if the plaintiff has proved that the employer intentionally discriminated against her because of her race. *Bryant*, 333 F.3d at 545 (citing *Fuller v. Phipps*, 67 F.3d 1137, 1141 (4th Cir. 1995)).

Miss Anderson applied for the position of administrative assistant in the Environmental Restoration Division, Project Administration Department in November of 1997. She interviewed for the position on December 15, 1997. The interview panel rated Miss Anderson on the six core competencies (teamwork, leadership, communications, employee development, business results, and self management) and four functional competencies (customer focus, flexibility, problem solving, and professionalism). Based on her interview responses, the panel gave Miss Anderson a total consensus rating of 136. The employee who was promoted, Linda Clarke, a white woman, received a total consensus rating of 190.

Miss Anderson's primary contentions on appeal are that she had more education and more experience at the Savannah River Site than Mrs. Clarke and that Miss Anderson's consensus rating was low based on her work evaluations and numerous awards and commendations. The interview panel chose Linda Clarke to receive the promotion because she was the "[b]est candidate based on quals. and interview." Anderson must show that this reason was a pretext for racial discrimination. See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993). In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000), the Supreme Court explained that a plaintiff may establish pretext by proving that the

defendant's explanation for an employment decision is "unworthy of credence" or that the defendant's explanation is false. The *Reeves* Court also noted that "[i]n appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose." 530 U.S. at 147. We followed *Reeves* in *Dennis v. Columbia Colleton Medical Center, Inc.*, 290 F.3d 639, 648-49 & n.4 (4th Cir. 2002), and determined that a plaintiff in a failure to promote case is not necessarily required to meet the test in *Evans v. Technologies Applications & Service Co.*, 80 F.3d 954, 960 (4th Cir. 1996), that a plaintiff "must establish that she was the better qualified candidate for the position sought." *Evans*, 80 F.3d at 960 (citing *Gairola v. Va. Dep't of Gen. Servs.*, 753 F.2d 1281, 1287 (4th Cir. 1985); *Young v. Lehman*, 748 F.2d 194 (4th Cir. 1984)).

Dennis instructs that we should not rigidly apply the *Evans* standard for comparing the plaintiff's qualifications with those of the person who received the promotion, but we may also consider the veracity of the reasons, annunciated by the employer, why the plaintiff did not receive the promotion. *Dennis*, 290 F.3d at 648-649 & n.4. "*Reeves* plainly instructs us to apply a contrary approach [to *Evans*] by affirming that it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." *Dennis*, 290 F.3d at 648 n.4 (citing *Reeves*, 530 U.S. at 147).

Miss Anderson cannot establish her own criteria for judging her qualifications for the promotion. She must compete for the promotion based on the qualifications established by her employer. See *Beall v. Abbott Labs.*, 130 F.3d 614, 620 (1997) ("[A]bsent evidence of retaliatory motive, we leave to the employer's discretion the method

of evaluating an employee's job performance."); see also *Jiminez v. Mary Washington Coll.*, 57 F.3d 369, 383 (4th Cir. 1995) ("The crucial issue in a Title VII action is an unlawfully discriminatory motive for a defendant's conduct, not the wisdom or folly of its business judgment.").

We assume, arguendo, that Miss Anderson has stated a prima facie case of racial discrimination. The question on her first claim for failure to promote thus turns on the issue of pretext. In order to prevail, Miss Anderson must direct us to evidence which indicates that the defendants' stated reasons for promoting Mrs. Clarke over Miss Anderson were a pretext for discrimination.

Miss Anderson had an executive secretary diploma and a bachelor of science degree in human resource management at the time she applied for the position of administrative assistant in the Environmental Restoration Division, Project Administration Department. She was close to finishing her masters in business administration. The minimum educational requirements for the position were a high school diploma and eight to twelve years of practical experience in a business or administrative area, or an associate degree in a nontechnical or business discipline with at least four to seven years of practical experience in a business or administrative area, or a bachelor's degree in a nontechnical or business discipline and at least one to three years of practical experience in business, administrative, budgeting, or program planning. Miss Anderson exceeded the educational requirements, and she had more education than Linda Clarke, who only had a high school diploma. However, educational qualifications, while listed in the minimum requirements section of the administrative assistant competency based posting system job description, were not among the factors that

the interview panel used to determine each applicant's consensus rating. As a result of the defendants' decision to base the promotion decision on the core and functional competencies listed in the job description and not on the educational levels of applicants, Miss Anderson cannot rely on her educational background to establish that the defendants' reasons for promoting Mrs. Clarke was a pretext for discrimination. See *Beall*, 130 F.3d at 620; *Jiminez*, 57 F.3d at 383. Miss Anderson may not choose the areas in which she wants to compete with Mrs. Clarke for the promotion; those areas are for the employer's choosing.

Miss Anderson contends that she has more experience at the Savannah River Site than Mrs. Clarke. At the time of her application for promotion to administrative assistant in the Environmental Restoration Division, Project Administration Department, Mrs. Clarke had 15 years of secretarial experience prior to beginning work at the Savannah River Site. After being hired at the Site, she had seven years of experience at the time she applied for the position. In contrast, Miss Anderson had only eight years of experience as a secretary at the Site. While Miss Anderson, with seven years of secretarial experience and twelve as a typist or stenographer, has a longer total tenure at the Site than Mrs. Clarke, she cannot choose the criteria by which an employer makes a promotion decision. See *Beall*, 130 F.3d at 619-20. Regarding experience, the CBPS posting of the position explained that experience was a minimum requirement, and not a deciding factor in the application process.

Furthermore, the deciding factor in the promotion decision was the rating for core and functional competencies that each applicant who was interviewed received. Mrs. Clarke received the highest score, 190, and Miss

Anderson received the second-lowest score, 136. A comparison of the two rating forms, compiled by the same interview panel, indicates that the panel found Mrs. Clarke to be the superior candidate. Miss Anderson's attempts to show that the CBPS system, which creates the consensus rating system upon which the promotion decision was based, discriminates against black employees also are unsuccessful. This contention is based on Dr. Bradley's study comparing the percentage of black employees who are successful at three separate steps in the CBPS to the expected percentage of successful black candidates based on the total percentage of black employees at the Site. As we discussed previously, this study fails to consider the various factors that are involved in a promotion decision. It does not prove that the CBPS discriminates against black employees on the basis of race, and Miss Anderson cannot use it to avoid summary judgment on her 1997 failure to promote claim. We are of [the] opinion that the district court did not err in granting summary judgment to the defendants on this claim.

Miss Anderson's next claim involves her application in 1998 for a promotion to administrative assistant in the Business Development and Community Outreach Division. Miss Anderson was not selected for an interview, and a white woman, Mrs. Brenda Pearson, was selected to receive the promotion. Miss Anderson contends that she did not receive the promotion due to her race.

The issue again turns on pretext as we assume, arguendo, that Miss Anderson has established a prima facie case of racial discrimination. On appeal, Miss Anderson contends that she established pretext because she has a stronger educational background than Mrs. Pearson, that the defendants pre-selected Mrs. Pearson for the

position, and that the ratings given to Miss Anderson in the interview selection stage evidence discrimination because they do not correspond to Miss Anderson's performance reviews. Miss Anderson also reiterates the contention, which we have rejected, that the CBPS discriminates against black employees seeking promotions at the Site.

While Miss Anderson has a stronger educational background than Mrs. Pearson, education is listed as a minimum requirement for the position and is not a deciding factor in determining who receives the promotion. Mrs. Pearson received the promotion because she had a higher consensus rating on the core and functional competencies for the position than Miss Judy Burch, the other employee interviewed for the promotion. The selection of applicants for interviews also was based on an evaluation of core and functional competencies, not on educational backgrounds. As we noted before, Miss Anderson may not choose the criteria on which she wishes to compete with Mrs. Pearson for the promotion. Moreover, she cannot establish pretext by relying on criteria of her choosing when the employer based its decision on other grounds. See *Beall,* 130 F.3d at 620; *Jiminez,* 57 F.3d at 383.

Miss Anderson next contends that she established pretext by showing that Miss Virginia Wolfe, the hiring manager for the 1998 promotion in the Business Development and Community Outreach Division, preselected Mrs. Pearson for the promotion. At the time the promotion decision was made, Mrs. Pearson was a secretary who reported to Miss Wolfe, along with eight other individuals. The functions of the position for which Miss Anderson applied were, prior to the selection of Mrs. Pearson, being

performed by Mrs. Pearson in her position as a secretary reporting to Miss Wolfe.

The argument that a supervisor may have preselected an employee for a promotion "is not sufficient evidence for jurors reasonably to conclude" that the defendants' explanation for hiring Mrs. Pearson was prextext. *Mackey v. Shalala,* 360 F.3d 463, 468-69 (4th Cir. 2004). "If one employee was unfairly preselected for the position, the preselection would work to the detriment of all applicants for the job, black and white alike." *Blue v. United States Dep't of the Army,* 914 F.2d 525, 541 (4th Cir. 1990). The *Blue* court noted that while preselection may establish that an employee was "unfairly treated, it does not by itself prove racial discrimination." 914 F.2d at 541 (citing *Casillas v. United States Navy,* 735 F.2d 338, 344 (9th Cir. 1984) ("Title VII does not ensure the best will be selected – only that the selection process will be free from impermissible discrimination.")).

Miss Anderson's final contention regarding the 1998 promotion is that the ratings given to her in the interview selection stage establish pretext because they do not reflect the positive evaluation she received during her performance reviews. Miss Anderson's argument asks us to review the process by which the defendants select employees for promotion. Miss Anderson has not introduced any evidence that her performance reviews were submitted to the hiring manager who selected applicants for an interview. Without proof that the hiring manager had access to Miss Anderson's performance reviews, there is no basis to conclude that the hiring manager was even aware of the positive comments Miss Anderson had received on her performance evaluations. Furthermore, the performance evaluation is a review of an employee's

performance in her current position, while the process of selecting a person for a promotion involves a consideration of how that employee will perform in a different position. In other words, the performance evaluation and the interview selection stage, which involves an analysis of how the applicant meets the core and functional competencies of the position that is open, are not interchangeable. We do not sit as a "super-personnel department weighing the prudence of employment decisions" made by the defendants. *DeJarnette v. Corning, Inc.*, 133 F.3d 293, 299 (4th Cir. 1998). We cannot require that different supervisors within the same organization must reach the same conclusion on an employee's qualifications and abilities.

We are of opinion that the district court did not err in granting summary judgment to the defendants on Miss Anderson's 1998 failure to promote claim.

Miss Anderson's final disparate treatment failure to promote claim centers on her failure to receive a promotion in place from SGL 28 SOP to SGL 30 SOP. At the time she sought this promotion, she was an administrative assistant in the university relations group within the chemicals hydrogen technology group. Again, the issue turns on the question of pretext.

Miss Anderson must establish that there is a genuine issue of material fact as to the defendants' stated reason for why she did not receive a promotion in place to SGL 30 SOP. The defendants have introduced affidavits from three compensation analysts who recommended that Miss Anderson's position remain a SGL 28 SOP position instead of a SGL 30 SOP position as of 1999. Miss Anderson does not direct us to any evidence which suggests that these

analysts reached their conclusions by improperly considering race instead of the actual responsibilities of Miss Anderson's position. Miss Anderson attempts to rely on her own affidavit to create a genuine issue of material fact, but nothing in her affidavit controverts the analysts' analysis of her position or suggests that the analysts were motivated by racism to refuse to qualify her position as a SGL 30 SOP position.

Miss Anderson attempts to establish pretext by comparing herself with two white employees who received promotions in place within two years of entering their current position. This argument fails to establish pretext. Miss Anderson seeks to compare herself to employees who hold positions that are dissimilar to her own. The first white employee, Craig Stripling, is an associate engineer who was promoted from SGL 28 to SGL 30 after working as an associate technical support specialist for less than two years. The second, Michelle Trill, a human resources consultant, was promoted six times between 1989 and 1995. These two white employees worked in separate divisions from Miss Anderson and had different responsibilities. Their promotions could be based on factors that may not be present in Miss Anderson's position. The fact that the white employees received promotions and Miss Anderson did not, when the job requirements and responsibilities for the white employees are different from Miss Anderson's, does not establish pretext.

Miss Anderson further claims that the rapid promotions of these two white employees occurred in violation of a Site policy that employees do not receive pay increases unless they have been in their current position for more than two years. Miss Anderson bases this claim on a statement made to her by her manager that "promotions

were not usually given until an employee had been in a position for two to four years." This statement, which contains the qualifier "usually," coupled with the fact that Miss Trill and Stripling were promoted without two years of experience in their positions, does not establish pretext. Miss Anderson's manager informed her of the usual policy, but his statement reflects the fact that exceptions do exist.

Miss Anderson did not receive a promotion in place because her job responsibilities did not warrant such an increase. She has not shown us any evidence which suggests that this reason was a pretext or from which a jury could infer pretext. See *Bryant*, 333 F.3d at 544 (noting that a jury could infer discrimination based on "the lack of any real reason to deny Bryant the job"). In this case, the defendant has stated a reason why Miss Anderson did not receive a promotion, and Miss Anderson has been unable to controvert it.

We are of opinion that the district court did not err in granting summary judgment to the defendants on Miss Anderson's disparate treatment failure to promote in place claim.

IX.

Miss Anderson appeals the district court's decision denying the plaintiffs' motion for class certification. On appeal, she argues that the district court erred by failing to certify two subclasses, one composed of black Site employees who were discriminated against under the CBPS and one composed of black Site employees who were discriminated against under the RP3 system. Miss Anderson is not a member of either of the two subclasses. As we have discussed above, all of Miss Anderson's claims,

whether based on a disparate impact or disparate treatment theory, are without merit, and the district court properly granted summary judgment to the defendants on each of the claims. Miss Anderson voluntarily has dismissed the one claim which remained after the district court ruled on the defendants' motion for summary judgment, the disparate treatment merit pay claim. Accordingly, Miss Anderson no longer has any valid claims pending in this case. In *Cox v. Babcock & Wilcox Co.*, 471 F.2d 13 (4th Cir. 1972), and later in *Goodman v. Schlesinger*, 584 F.2d 1325 (4th Cir. 1978), we considered almost the same issue.

In *Cox*, the plaintiff alleged that he was subject to unlawful discrimination under the employment practices of the defendant. 471 F.2d at 14. The plaintiff brought both individual and class action claims. The district court proceeded to try the plaintiff's individual claims in a bench trial with an advisory jury without first ruling on the plaintiff's class action claims. After the bench trial, the district court dismissed the plaintiff's individual claims after concluding that the defendant had not practiced illegal discrimination. 471 F.2d at 14. The district court then dismissed the plaintiff's class action claims because the plaintiff, without any individual claims, was not a proper class representative. The plaintiff appealed both rulings to this court.

On appeal, we affirmed the district court's dismissal of the plaintiff's individual claims. 471 F.2d at 14-15. Turning next to the plaintiff's class claims, we noted the awkwardness of remanding the class claims to the district court where the plaintiff, although "finally adjudged not to be a member of the class he seeks to represent," would nonetheless continue to prosecute the class claims in the

district court upon remand. 471 F.2d at 15-16. We remanded the class claims to the district court and instructed the district court to hold the docket for the class claims open in case any other plaintiffs presented proper claims against the defendant. 471 F.2d at 16.

In *Goodman*, the district court denied the plaintiffs' motion for class certification on the grounds that the plaintiffs did not comply with the requirements of Rule 23 of the Federal Rules of Civil Procedure. 584 F.2d at 1327. At trial on the plaintiffs' individual claims, the district court found against the plaintiffs and denied their individual claims. 584 F.2d at 1329-1331. On appeal, the plaintiffs challenged the district court's rulings on both the denial of class certification and the dismissal of the individual claims.

We affirmed the dismissal of the plaintiffs' individual claims and noted that the plaintiffs "have had their day in court" to pursue their individual claims. 584 F.2d at 1331. Turning to the certification issue, the court determined that the district court acted prematurely in declining to certify the class action because the district court ruled on the certification question prior to the completion of discovery. 584 F.2d at 1332. Following *Cox*, in *Goodman* we remanded the class action issue to the district court but instructed that the plaintiffs in the appeal might not pursue the class claims on remand. Instead, the district court should retain the case on the docket for a reasonable time to permit a proper plaintiff or plaintiffs, with grievances similar to [the plaintiffs on appeal], in person, to present himself to prosecute the action as class representative. *Goodman*, 584 F.2d at 1332-1333. We followed the procedure in *Goodman* and *Cox* again in *Simmons v. Brown*, 611 F.2d 65 (4th Cir. 1979).

On appeal, Miss Anderson seeks to be a class representative for two separate sub-classes based on the defendants' use of the CBPS and RP3 systems. Her claims have not been mooted, but instead have been adjudged to be without merit. Miss Anderson has no valid claims which give her "the same interest" and cause her to "suffer the same injury" as the proposed class members she seeks to represent. See *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977).

The claim of Miss Anderson on appeal with respect to the denial of certification of a class action is clearly stated:

> Anderson appeals the District Court's denial of certification of two subclasses of African-American employees with claims based on (1) the CBPS and (2) the RP3.

With respect to the RP3 claim, there is no indication or claim of any successful prosecution of that claim without the rejected testimony of Dr. Bradley, who was examined in open court by the district judge and the parties. The denial of the district court to certify a class action with respect to the RP3 procedure is accordingly affirmed.

With respect to the CBPS claim, we express no opinion on the question of whether or not some part of Miss Anderson's claim relating to the administration of that system of career advancement or job availability may be a colorable class claim, although none has been shown here. We say this because of the decision of the district court with respect to Dr. Bradley's testimony in which it denied the motion to exclude the testimony "from the qualified to the interview stage, and from the interview stage to the selection stage," but it granted the motion to exclude the testimony "from the pool stage to the qualified stage."

Stated simply, the court held that the evidence did not show that the Human Resources Department might have discriminated in preparing the list of those qualified for job openings but that the statistical evidence might be admissible if it tended to show the possibility of discrimination in selecting those applicants who would be interviewed and in selecting the person for the job from among those interviewed.

While we express no opinion on whether or not the class action may fail for want of commonality or typicality, we remand to the district court the question of whether or not a class action should be permitted to proceed with respect to the "qualified to the interview stage, and from the interview stage to the selection stage." Upon remand, if a proper plaintiff or plaintiffs with grievances similar to those of Miss Anderson with respect to that discrete portion of the CBPS procedure presents himself to prosecute, himself, as a class representative, the district court should then decide whether a class action is maintainable and whether the then named plaintiff should represent the class. We express no opinion as to the weight, if any, to give Dr. Bradley's testimony or whether it is admissible. If no representative plaintiff so comes forward within a reasonable time, then the district court should strike the class action from the calendar and enter a final dismissal thereof. *Goodman*, 584 F.2d at 1332-33.

X

Accordingly, as stated above, the district court's decision excluding Dr. Bradley's expert RP3 testimony, excluding the Department of Energy draft assessment, and granting summary judgment to the defendants on

Miss Anderson's individual disparate impact and disparate treatment claims are affirmed. The denial of a class action with respect to the RP3 procedure is affirmed, as is the denial of a class action with respect to the CBPS procedure, with the exception of that part of the CBPS procedure noted just above. This action is remanded to the district court to keep the same on the docket for a reasonable time, with instructions to determine if there is another plaintiff who wishes to maintain a class action under the principles established in *Cox* and *Goodman* we have referred to.

AFFIRMED IN PART,
VACATED IN PART,
AND REMANDED WITH INSTRUCTIONS.

NIEMEYER, Circuit Judge, concurring in part and dissenting in part:

I am pleased to concur in Judge Widener's thorough and well reasoned opinion insofar as it affirms the district court's judgment. But I cannot agree with a remand "to determine if there is another plaintiff who wishes to maintain a class action."

Because the plaintiff has no cognizable claim, she is not in a position to represent the class of others because either her claims are not typical of the others or, if they are, the others' claims likewise have no merit.

The problem that Judge Widener raises in Part IX would, in my judgment, be resolved just as well by some other plaintiff, not in this case, alleging his or her own claim and seeking to prosecute it as a class action. As for

this case, I would consider it ended with our opinion affirming the judgment of the district court.

By remanding this case to the district court with no plaintiff, we can only be inviting new claims – different from those that we have rejected in this case – to be filed on behalf of a new plaintiff and unspecified others. This is not the situation where a plaintiff's claims have been dismissed on a technical deficiency, and we would be allowing another plaintiff without that deficiency to continue the case. Rather, we have a case where the plaintiff's claims were dismissed because the claims themselves were deficient. In short, there is nothing to perpetuate on remand.

Accordingly, I respectfully dissent from Part IX and the remand remedy contained in Part X. Otherwise, I concur in this fine opinion.

GREGORY, Circuit Judge, dissenting in part:

Although I agree with most of the majority's analysis, I write separately because I cannot concur in the disparate impact analysis contained in part VII(B). There, the majority affirms a grant of summary judgment against Ms. Anderson on her disparate impact claim despite the fact that she produced evidence showing a statistically significant variation between the number of African-Americans who apply and the number who are successful at both the second and third stages of the CBPS. The majority first finds that because Ms. Anderson's evidence challenging the subjective nature of the second and third stages of the CBPS failed to control for all subjective variables potentially taken into account in the interview

and hiring decisions, she failed to establish the causation element of her prima facie burden. Second, the majority finds that even if Ms. Anderson had in fact satisfied her prima facie burden, her claims would fail because she cannot make the requisite *McDonnell Douglas* showing that Westinghouse's legitimate non-discriminatory rationale was mere pretext for a racially discriminatory decision.

Because I cannot agree with either of these contentions, I respectfully dissent from that particular part of the majority opinion.

I.

Under Title VII of the Civil Rights Act of 1991:

> It shall be an unlawful employment practice for an employer –
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2 (2005). From inception, it was clear that the act covered cases of disparate treatment – where one party was intentionally discriminated against by an employer on the basis of race, color, religion, sex, or

national origin. *See Int. Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) ("Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII.").

However, in the seminal case of *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971), the Court held that "[t]he Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *See Peters v. Jenney*, 327 F.3d 307, 321 n.17 (4th Cir. 2003) ("Title VII prohibits practices that are not intentionally discriminatory but that have a disparate impact on members of a particular racial group."). As amended in 1991, Title VII now explicitly recognizes disparate impact claims. 42 U.S.C. § 2000e-2(k). Section 2000e-2(k) states as follows:

> (1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if –
>
> (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or
>
> (ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

42 U.S.C. § 2000e-2(k).

Similar to its analysis of disparate treatment, the Supreme Court has laid out a burden shifting scheme for disparate impact actions. *See Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 994-95 (1988). Under the disparate impact burden-shifting scheme, the first step is for the plaintiff to establish a prima facie case of disparate impact. *See id.* at 994. To make this prima facie showing, a plaintiff must (1) identify a specific policy or practice, (2) demonstrate that a disparity exists, and (3) establish a causal relationship between the two. *See id.* at 994-95. Upon successfully presenting a prima facie case, the burden then shifts to the employer to "demonstrate that the challenged practice is job related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(a)(i); *see Walls v. City of Petersburg*, 895 F.2d 188, 191 (4th Cir. 1990) ("[T]he employer must then demonstrate that 'any given requirement [has] a manifest relationship to the employment in question,' in order to avoid a finding of discrimination."). Finally, even if the employer makes a sufficient showing that the challenged practice is "job related," the plaintiff may prevail by showing the existence of an equally effective alternative practice that eliminates the disparate impact and the employer refuses to adopt this alternative. 42 U.S.C. § 2000e-2(k)(1)(a)(2); *see Allen v. City of Chicago*, 351 F.3d 306, 311-12 (7th Cir. 2003) ("If the defendant makes this showing, plaintiffs can still prevail by demonstrating that an alternative employment practice exists, and the defendant refuses to adopt it.").

II.

Contrary to the majority, I believe that Ms. Anderson did in fact satisfy her prima facie burden for a Title VII

disparate impact claim. Therefore, I will address each step of the analysis in turn.

A.

As noted earlier, the first step in establishing a prima facie case is the identification of a specific policy or practice. Here, Ms. Anderson challenges the second and third stages of the Competency Based Posting System ("CBPS")[1] as having a disparate impact on African-American employees. Ms. Anderson specifically challenges the subjective decision-making involved in each stage. The majority "assumes arguendo" that by challenging these stages Ms. Anderson identified a specific employment practice.

In *Watson*, the Court addressed the issue of whether a disparate impact analysis could properly be applied to subjective criteria.[2] *See Watson*, 487 U.S. at 989. There, the Court held that "subjective or discretionary employment practices may be analyzed under the disparate impact approach in appropriate cases." *Id.* at 991. "We are persuaded that our decisions in *Griggs* and succeeding cases could largely be nullified if disparate impact analysis were applied only to standardized selection practices."

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[1] Specifically, Ms. Anderson challenged steps #9, #12, #13 of the CBPS.

[2] In *Watson*, the Court noted that its disparate impact jurisprudence had always involved cases in which standardized employment tests or criteria were challenged. *Id.* at 988. For example, in *Griggs* the Court faced challenges to high school diploma requirements and aptitude tests. *Griggs*, 401 U.S. at 301-02. Similarly, in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 427 (1975), the Court faced challenges to aptitude tests. Finally, in *Connecticut v. Teal*, 457 U.S. 440, 445 (1982), the Court faced challenges to written examinations.

Watson, 487 U.S. at 989. The Court continued on to conclude that:

> If an employer's undisciplined system of subjective decision-making has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII's proscription against discriminatory actions should not apply. In both circumstances, the employer's practices may be said to "adversely affect [an individual's] status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(2).

Id. at 990-991.

In this case, I would find that Ms. Anderson did in fact satisfy the first element of her prima facie burden. Ms. Anderson challenged the second and third stages of the CBPS system, both of which entail an interview panel subjectively rating qualified candidates across a number of subjective criteria. The second stage is a screening stage, where the applications of applicants who are found to meet the minimum requirements by the Human Resources department are forwarded to the manager of the department with the opening. That person, either by themself or in conjunction with two others, then screens all the applications with "core competencies" (teamwork, leadership, communications, employee development, business results and self management) and "functional competencies" in mind, to find the most qualified candidates to interview for the position. The third stage of the process involves the actual interviews of those candidates selected. Interviews are conducted by a three-person panel, during which each member of the panel evaluates the candidate in writing

according to the above criteria and any other relevant characteristics. After all interviews are conducted, the panel then selects who it believes is the best person for the position.

Ms. Anderson is not required to challenge a more specific aspect of the hiring process, particularly when she is challenging a subjective process. In *Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1420, 1424-25 (9th Cir. 1990), the Ninth Circuit held that where "[e]mployment decisions as to which jobs would be eliminated and as to who would fill the remaining positions was essentially left to the discretion of the various bank departments," such a policy was a specific employment practice subject to disparate impact analysis, even where the managers were instructed to consider factors such as longevity and performance. Similarly, in this case, while those making the decisions in the second and third stages of the CBPS were instructed to evaluate candidates according to certain qualities, whether the applicants showed any aptitude for the guideline qualities was an entirely subjective evaluation. After all, how does one truly quantify or measure "teamwork" or "communications" without making a wholly subjective assessment?

In its attempt to distinguish cases such as *Watson* and *Rose*, I believe that the majority overstates the level to which the discretion present in this case was cabined by the process. Focusing on the *Watson* Court's language describing subjective employment practices as "unchecked discretion" and as an "undisciplined system of subjective decision making," the majority argues that because the discretion in this case was not unfettered, the holdings of *Watson* and *Rose* are not applicable here. The majority finds support for this position in the fact that the decision

makers were instructed to consider core and functional competencies when making their decisions. However, the majority's focus on the *Watson* Court's language describing subjective employment practices as "unchecked discretion" and as an "undisciplined system of subjective decision making," is misplaced. The crux of the *Watson* decision is that "disparate impact analysis is in principle no less applicable to subjective employment criteria than to objective or standardized tests" because "[i]n either case, a facially neutral practice, adopted without discriminatory intent, may have effects that are indistinguishable from intentionally discriminatory practices." *Watson*, 487 U.S. at 990. Later in the *Watson* opinion, the Court then repeated this position, stating "[i]f an employer's undisciplined system of subjective decision making has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII's proscription against discriminatory actions should not apply." *Id.* at 990-91. The clear focus of the *Watson* opinion is not the degree to which subjective discretion is unfettered, but instead the fact that both objective and subjective criteria can have deleterious effects that are indistinguishable from intentionally discriminatory practices. *That* was the reason the Court concluded "that subjective or discretionary employment practices may be analyzed under the disparate impact approach in appropriate cases." *Id.* at 991.

Because I believe that the challenged practices are undisputably subjective in nature, I see no reason not to apply the rule of *Watson* in this case, and find that Ms. Anderson identified a specific employment practice.

B.

Ms. Anderson was next required to show a causal nexus between the challenged practice and the disparity. The statute itself mandates that the plaintiff demonstrate that the employer "uses a particular employment practice that *causes* a disparate impact." 42 U.S.C. § 2000e-2(k); *see Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 657 (1989) ("a Title VII plaintiff does not make out a case of disparate impact simply by showing that, 'at the bottom line,' there is racial imbalance in the work force. As a general matter, a plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack.").

As an initial matter, it is well recognized that statistical evidence may be employed in disparate impact cases to show the existence of a disparity. *See New York City Transit Auth. v. Beazer,* 440 U.S. 568, 584 (1979); *Walls,* 895 F.2d at 191 ("A plaintiff may use statistical evidence to establish a prima facie violation of Title VII."). As the Court noted in *Watson,* the term "disparity" has "never been framed in terms of any mathematical formula." *Watson,* 487 U.S. at 994-95. Further, the Court has never "suggested that any particular number of standard deviations can determine whether a plaintiff has made out a prima facie case in the complex area of employment discrimination," but has instead endorsing a case-by-case approach. *Id.* at 995 n 3.

Ms. Anderson presented the testimony of Dr. Edwin Bradley, Ph.D., CEO of Quantitative Research Associates. Specifically, Dr. Bradley found that at the second screening stage, a statistically significant under-representation (-6.64 standard deviations) of African-Americans existed when

the pool of applicants meeting the minimum qualifications for the posted position was compared to the applicants actually selected for an interview. J.A. 1645. Similarly, Dr. Bradley found that at the third screening stage, a statistically significant under-representation (-2.38 standard deviations) of African-Americans existed when the pool of applicants selected for an interview was compared to those selected for appointment. J.A. 1645.

Despite this, the district court concluded and the majority concludes that because Ms. Anderson's statistical evidence failed to control for all variables that may have impacted the decisions made at the challenged stages, it is insufficient to establish causation. Specifically, the majority states:

> "This evidence does not show that the reason black applicants failed to proceed at the interview selection stage and position selection stage was their race. Factors such as presentation in the interview, answers to interview questions, demeanor, and ability demonstrated in the interview of course entered into the judgment of the members of the panel as to the candidate who received a position that was being filled."

Ante at 25.

However, statistical evidence does not have to control for every single variable in order to be sufficient. As the Supreme Court stated in *Bazemore v. Friday*, 478 U.S. 385 (1986), "it is clear that a regression analysis that included less than all 'measurable variables' may serve to prove a plaintiff's case. A plaintiff in a Title VII suit need not prove discrimination with scientific certainty; rather his

burden is to prove discrimination by a preponderance of the evidence."[3] *Id.* at 400. Therefore, requiring Ms. Anderson to account for every possible variable that may have impacted the outcome goes beyond Supreme Court formulations of the plaintiff's burden in a Title VII disparate impact case. In *Watson*, a case where the Court faced a challenge to subjective practices, the Court required that the plaintiff "offer evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group," and importantly noted that its formulations have "consistently stressed that statistical disparities must be sufficiently substantial that they raise such an inference of causation." *Watson*, 487 U.S. at 995. Similarly, in *Albemarle*, the Court required the plaintiff to show "that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." *Albemarle*, 422 U.S. at 425; *see also Dothard*, 433 U.S. at 329 ("[T]o establish a prima facie case of discrimination, a plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern.").

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[3] The Court's decision in *Bazemore* has been read as allowing regression analyses that account for the "major" factors. *See e.g. Smith v. Virginia Commonwealth Univ.*, 84 F.3d 672, 676 (4th Cir. 1996) ("While the omission of variables from a regression analysis may render the analysis less probative than it otherwise might be, it can hardly be said, absent some other infirmity, that an analysis which accounts for the major factors 'must be considered unacceptable as evidence of discrimination.' Normally, failure to include variables will affect the analysis' probativeness, not its admissibility. Importantly, it is clear that a regression analysis that includes less than 'all measurable variables' may serve to prove a plaintiff's case.")

I am of the opinion that Ms. Anderson satisfied her burden because [Dr.] Bradley's testimony is sufficient to show that the stages in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants. In fact, the district court recognized that Dr. Bradley's analysis demonstrated a "statistically significant variation between the number of African-Americans who apply and the number who are successful at both the second and third step of the CBPS process." J.A. 12228. As the CBPS process is set up, all candidates who made it to stage two of the process possessed *at least* the minimum qualifications for the posted position. Further, all candidates who received a stage three interview were not only minimally qualified for the position in question, but were also found by the relevant department manager to be the *most qualified* of all applicants. Yet despite this, Dr. Bradley found a statistically significant under-representation of African-Americans when comparing the applicant pools to the successful candidates at the end of each stage.

Given these facts, I am at a loss to understand how the majority finds that Ms. Anderson's statistics fail to show that the stages in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants. These statistics present more than just a disparity in Westinghouse's work force; they present evidence that the challenged stages have caused the exclusion of African-Americans because of their membership in a protected class. And this evidence, by virtue of the nature of the hiring process itself, controlled for the major factor in the hiring process that could be controlled for, namely that of qualification. For example, despite the fact that at stage three only the most qualified

candidates are interviewed, Dr. Bradley found that African-Americans were under-represented in the class of those who actually received appointments after interviewing. I recognize that this court is under no obligation to "assume that plaintiffs' statistical evidence is reliable." *Watson,* 487 U.S. at 996. However, where a party shows that there is a statistically significant under-representation of African-Americans successfully completing a challenged subjective stage of a hiring process, despite a number of qualified African-American candidates,[4] I fail to see how an *inference* of causation for the purposes of establishing a prima facie case of disparate impact has not been shown.

Additionally, by faulting Ms. Anderson for not controlling for certain variables, the majority is in essence faulting her for not controlling for the exact factor that she is here challenging as causing a disparate impact – the subjective aspects of stages two and three. The majority states that "[f]actors such as presentation in the interview, answers to interview questions, demeanor, and ability demonstrated in the interview" are factors that entered in the ultimate hiring decisions, and that therefore in order to show causation any statistical evidence must control for these factors. *Ante* at 25. However, these are all subjective evaluations, and exactly what Ms. Anderson is challenging. The majority points out that Ms. Anderson did not account for the evaluation of core and functional competencies. But again, the evaluation of the core competencies, and any relevant functional competencies, is largely a subjective evaluation. While faulting Ms. Anderson for not

[4] Especially at the third stage where all African-American interviewees were considered to be among the most qualified applicants.

controlling for these factors, the majority never explains how such control would even be possible. As I questioned earlier, how does one quantify "teamwork" or "leadership," such that it can be controlled for in a statistical setting. The very nature of the subjective process challenged makes such control impossible.

As such, because Ms. Anderson identified a specific practice, demonstrated the existence of a disparity and established a causal nexus between the two, I would hold that Ms. Anderson did in fact state a prima facie case of disparate impact.

III.

Despite its belief that Ms. Anderson failed to satisfy her prima facie burden, the majority assumes arguendo that she has and continues with its disparate impact analysis. According to the majority:

> the question is whether the proffered circumstantial evidence of discriminatory impact is sufficient to satisfy the *McDonnell Douglas* framework of proof. . . . Under this framework the plaintiff must first establish a prima facie case of discrimination. Then, the defendant must respond with evidence that it acted with a legitimate, nondiscriminatory reason. If the defendant makes this showing, then the plaintiff must "present evidence to prove that the defendant's articulated reason was pretext for unlawful discrimination."

Ante at 26. After noting that under *McDonnell Douglas* the ultimate burden of proving intentional discrimination remains on the plaintiff, the majority finds that Ms. Anderson failed to show that Westinghouse's legitimate

nondiscriminatory reason was mere pretext for intentional discrimination.

In reaching this conclusion, the majority ignores the Supreme Court's decision in *Griggs*, the impact of which was to squarely reject the notion that in order to state a claim for employment discrimination the claimant must make a showing of intent. As the Court stated in *Griggs*, "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built in headwinds' for minority groups and are unrelated to measuring job capability." *Griggs*, 401 U.S. at 432.

Disparate impact and disparate treatment are two legally distinct causes of action under Title VII. Disparate treatment requires the plaintiff to prove that the defendant had discriminatory intent or motivation. *See Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 986 (1988). In contrast, disparate impact seeks to ferret out employment practices that are the functional equivalent of intentional discrimination because they cause significant adverse effects on protected groups, but have no deliberate discriminatory motive. *Id.* at 986-87. It is important to note that while the Supreme Court has enunciated burden-shifting schemes for both disparate treatment and disparate impact, the schemes possess critical differences that prevents one from applying either test in the other context. *See* Lex K. Larson, *Employment Discrimination* § 8.01 (2d ed. 2004) ("The principal category of suits to which the *McDonnell Douglas* formula does not apply is that exemplified by the 1971 case of *Griggs v. Duke Power Co.*"). As the Court noted in *Watson*, "[t]he factual issues and the character of the evidence are inevitably somewhat

different when the plaintiff is exempted from the need to prove intentional discrimination." *Watson*, 487 U.S. at 987.

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), sets forth the Supreme Court's burden shifting formula for dealing with the problem of proof in intentional discrimination cases.[5] Under the *McDonnell Douglas* burden shifting formula, after the plaintiff establishes a prima facie case, "the burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.* Should the employer articulate such a reason, the plaintiff must then be afforded an opportunity to show that the articulated reason was merely pretext for a racially discriminatory decision. *Id.* at 804-05.

By finding that Ms. Anderson had failed to show that Westinghouse's articulated reason was pretext, the majority in essence held that Ms. Anderson had failed to prove intent. However, in the context of her disparate impact claim, *Ms. Anderson was under no obligation to prove intent.* As the statute itself makes clear, where the employer demonstrates that the challenged practice is job related for the position in question and consistent with business necessity, the plaintiff may still prevail by showing the existence of an equally effective alternative practice that eliminates the disparate impact and that the

[5] *See* Lex K. Larson, *Employment Discrimination* § 8.01[1] (2d ed. 2004) ("Employers are, on the whole, too sophisticated to profess their prejudices on paper or before witnesses. The Supreme Court in *McDonnell Douglas*, recognizing the necessity in most instances of reliance on circumstantial evidence, laid down rules of proof under which direct evidence of discriminatory intent is not necessary to the making of a prima facie case.").

employer refuses to adopt that alternative. 42 U.S.C. § 2000e-2(k)(1)(a)(2). Nowhere does the statute require a showing of pretext, because pretext points to intent. Therefore, the majority's application of any such burden to Ms. Anderson is error.

IV.

Disparate impact is more than a mere method of smoking out intentional discrimination. Disparate impact attacks a set of deleterious behaviors that the intent standard fails to capture. By definition, the standard attacks only those practices that have a disparate impact on the employment opportunities of classes protected by Title VII when those practices are not supported by a legitimate business justification or where the same end-goals can be achieved in a less deleterious manner. Given the struggles of this nation, a practice that has a disparate adverse impact on a protected class, and yet either has no legitimate business justification, or can be achieved in a less harmful manner, is not a practice that we should allow to stand. Ultimately, this is a recognition by society that these practices, and their effects, are harmful in their own right. To continue moving a healing society forward, any such practices must be attacked under Title VII with a level of vigor equal to that spent combating intentional discrimination.

With its holdings today, the majority has made the mountain a plaintiff must climb to state a disparate impact claim harder to surmount. Not only has the majority in essence required the plaintiff here to prove causation to a scientific certainty, they have also forced the plaintiff to show intent despite the clear statutory and

jurisprudential dictates to the contrary. As I cannot concur with either of these results, I respectfully dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
AIKEN DIVISION

VIRGINIA ANDERSON, Plaintiff, vs. WESTINGHOUSE SAVANNAH RIVER COMPANY, LLC, Defendant.	Civil Action No. 1:00-1667-22 ORDER ADOPTING, IN PART, REPORT AND RECOMMENDATION

INTRODUCTION

(Filed Oct. 15, 2002)

This matter is before the court on Plaintiff Virginia Anderson's objections to the Report and Recommendation ("R&R") of the Magistrate Judge to whom the matter was assigned pursuant to 28 U.S.C. § 636 and Local Civil Rule 73.02, D.S.C. The R&R recommends that the motion for summary judgment filed by Defendant Westinghouse Savannah River Company, LLC, ("WSRC"), be granted in full.

For the reasons set forth below, the R&R is adopted to the extent it recommends summary judgment in WSRC's favor on all claims alleging failure to promote, whether asserted as disparate treatment or disparate impact claims, and any claim alleging failure to receive a higher rating in 1998-99. The court declines, however, to adopt the R&R to the extent it recommends that WSRC be granted summary judgment on Anderson's disparate

treatment claim based on the percentage raise she received in 1999 as discussed further below.

STANDARD

The Magistrate Judge makes only a recommendation to this court. That recommendation has no presumptive weight, and the responsibility for making a final determination remains with the court. *See Mathews v. Weber,* 423 U.S. 261 (1976). The court is charged with making a *de novo* determination of those portions of the recommendation to which specific objection is made. The court may accept, reject, or modify, in whole or in part, the recommendation of the Magistrate Judge, or recommit the matter to him with instructions. *See* 28 U.S.C. § 636(b)(1).

Because the underlying motion is a motion for summary judgment, this court applies the summary judgment standard in making its review of the portions of the R&R to which objection is made. Fed. R. Civ. P. 56. The summary judgment standard is fully and correctly set forth in the Magistrate Judge's R&R.

OBJECTIONS and DISCUSSION

The Magistrate Judge recommended summary judgment for WSRC on each of Anderson's five discrimination claims. Anderson objects to each of these determinations. She does not, however, object specifically to any portion of the Magistrate Judge's recitation of the facts which is, therefore, adopted herein. Additional facts are set forth below in the discussion of Anderson's individual claims.

December 1997, Failure to Promote – Disparate Treatment Claim.

In December 1997, Plaintiff applied for a position as an Administrative Assistant which position carried a grade of SGL 28. At that time, Anderson had nineteen years of service at the Savannah River Site (SRS). The last nine of those years had been as an Administrative Secretary at the grade of SGL 16. She had also recently earned her Bachelors Degree in Human Resources Management.

The Administrative Assistant position for which Anderson applied in December 1997 was filled using the Competency Based Posting System (CBPS). Plaintiff, an African-American, was one of fifteen applicants selected for an interview out of a pool of eighty-five applicants. She was not, however, selected for the position. The person who was selected, Linda Clarke, was white, had only a high school degree, and had fifteen years of secretarial experience.

The Magistrate Judge recommended summary judgment on this claim on two grounds. First, he concluded that Anderson had not established the fourth prong of the prima facie case in that she had not shown that "she was rejected . . . in favor of someone [who was] not a member of a protected group *under circumstances giving rise to an inference of unlawful discrimination as she fails to show that she was more qualified* for the position[] than Clarke." R&R at 8 (emphasis added). Second, he concluded that even if Anderson satisfied the fourth prong of the prima facie case, the same difficulty (lack of showing that she was more qualified) would prevent her from demonstrating that WSRC's proffered reasons for hiring Clarke were pretextual. R&R at 10.

Anderson objects to both grounds with the same basic arguments. First, she argues that the minimum requirements which were posted for the job provide evidence on which a jury could conclude that WSRC valued education over experience for this particular position. This argument is based on the decreasing amount of experience required relative to the education level of the applicant.[1] Thus, Anderson argues that her greater years of total experience at SRS in "performing secretarial duties" coupled with her greater education, should have caused WSRC to consider her more qualified than Clarke.

Anderson also argues that the reasons given by the CBPS panel for rating Clarke more highly (that they were impressed with Clarke's enthusiasm and her answers to questions during the interview), are contradictory to WSRC's stated reason for the promotion (that the panel found Clarke to be more qualified than Anderson). In addition, Anderson argues that the inherent subjectivity of the CBPS process makes the decision suspect, at least where, as here, the panel was comprised only of Caucasians.

As to each of these arguments, Anderson directs this court to her earlier memoranda, rather than specific evidentiary support.[2] She does, however, attach excerpts

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[1] The "Minimum Requirements" for this position were set forth as: "High school diploma and 8-12 years practical experience in a business or administrative area or ... BS/BA in a nontechnical or business discipline and at least 1-3 years of practical experience...." WSRC3123879.

[2] While the court has made every effort to locate the basis for the prior argument, it has no obligation to do so. The burden is on the objecting party to direct the court's attention to the evidence which

(Continued on following page)

from the relevant CPBS file which include the "Professional Position Submittal Form" for the relevant position. This form discloses the various criteria on which the job applicants for this position were to be judged. The above referenced educational and experience requirements appear under the heading "Minimum Requirements." The form then lists six "Core Competencies" and four "Functional Competencies" required for the position. Each of these ten areas of required competency is described in detail and is given a weight, to indicate its relative degree of importance.[3]

Plaintiff also attaches the forms completed by the panel as they conducted the two most critical interviews: Clarke's and her own. These contemporaneously completed forms demonstrate that the panel awarded Clarke a score of 190 based on the panel's assessment of her Core and Functional Competencies. This was one of the two highest scores of those interviewed. Anderson, by contrast, received a score of 136, next to the lowest score of the fifteen people interviewed. The lowest score (129.5) was given to a white applicant. A comparison of the specific comments relating to Clarke, Anderson, and the other thirteen interviewed candidates fully supports the conclusion that the interviewers judged Clarke to be best qualified of the group based on her disclosed qualifications and interview

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supports her position, not to some portion of an earlier memorandum from which the court might glean the basis of the objection.

[3] The listed "Core Competencies" are: (1) teamwork; (2) leadership; (3) communications; (4) employee development; (5) business results; and (6) self management. The listed "Functional Competencies" are: (1) customer focus; (2) flexibility; (3) problem solving; and (4) professional.

responses.[4] Other contemporaneous documents reveal that the panel determined Clarke to be the "Best candidate based on qual[ification]s and interview." WSRC 4014611. While phrased slightly differently, this court sees no contradiction between this explanation of the basis of the hiring decision and the statement that the panel was impressed by Clarke's enthusiasm and answers to the panel's questions.

Anderson offers nothing to challenge the veracity of the information recorded on these contemporaneously completed forms, including the accuracy of the panel's recorded impressions. Most particularly, Anderson does not suggest that the comments recorded on her interview form are false or misleading representations of her actual interview responses. Neither does she provide other evidence that the panel's ratings of each of the individual applicants was based on any criteria other than the panel's honest assessment of each applicant's abilities as to each of the weighted Core and Functional Competencies disclosed on the job posting form.

Further, Anderson fails to address her qualifications in terms of the disclosed weighted competencies. Instead,

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[4] For example, as to "Teamwork," the panel noted that Anderson "seemed to be overbearing . . . didn't have good concept of teamwork," while they noted that Clarke "demonstrated very positive attitude about teamwork." As to "Business Results," the panel noted that Anderson "seems adequate for this position" while Clarke "gave very good examples of processes she had made changes to for consistency or efficiency." As to "Customer Focus," the form reflects that Anderson indicated that "customers are someone 'she' valued and someone 'she' could work with – not a good concept of customer focus," while Clarke was "very customer focused." WSRC4014612-13 (Anderson interview form); WSRC 4014624-25 (Clarke interview form).

she focuses primarily on her allegedly higher satisfaction of the "Minimum Qualifications," arguing that she was better qualified for both this position and the position discussed in the next section for three specific reasons:

> (1) **better educatio.. credentials**: Anderson had a Bachelor of Arts degree in Human Resource Management, an Executive Secretary Diploma and was attending school at night to complete a[n] MBA, while both Clarke and Boggs only had a high school diploma; (2) **relevant administrative experience**: the three applicants had similar years' experience in administrative/secretarial work (19 years for Anderson and perhaps 10 to 22 years each for Clarke and Boggs), [and] Anderson had performed administrative-secretarial duties for over ten years more at the Site than either Clarke or Boggs; . . . and (3) **outstanding quality of past performance**: Anderson had received numerous awards, commendations, and recognitions, which on their face exceeded any recognitions received by the selectees.

Anderson Objection Memorandum at 12-13 (emphasis in original).

While these may be the criteria by which Anderson believes she should have been judged, Anderson has not offered any evidence that WSRC or the particular individuals who made up the CBPS panel have, at any time, applied such a set of standards: focusing on the "Minimum Qualifications" and ignoring the "Core" and "Functional Competencies." Her argument, then, is based on the presumption that she or this court can dictate what criteria the employer should use in evaluating job applicants. The law, however, is to the contrary. *See generally DeJarnette v. Corning, Inc.*, 133 F.3d 293, 299 (4th Cir.

1998) ("[T]his Court does not sit as a kind of super-personnel department weighing the prudence of employment decisions made by firms charged with employment discrimination.") (internal quotation omitted).

Based on the above evidence, this court concludes that Anderson has failed to proffer evidence which would be sufficient to present a genuine issue of material fact as to whether the reason given by WSRC for its decision to select Clarke rather than Anderson was pretextual. In light of this determination, this court need not address whether Anderson established the fourth prong of her prima facie case.

January 1998, Failure to Promote - Disparate Treatment Claim.

Anderson also applied for but did not receive a promotion to Administrative Assistant in January 1998. This position carried a grade of SGL 28/30. It was also filled through the CBPS. Plaintiff did not receive an interview for this position. It was filled by Brenda (Pearson) Boggs, a white employee.

One of Anderson's concerns as to this position is that the hiring supervisor had already decided that Boggs was her preferred candidate before placing the job on the CBPS. There is certainly evidence from which a jury could reach this conclusion, including that Boggs had been performing most of the duties of the newly created position prior to it being posted through the CBPS. *See* Virginia Wolfe Depos. at 19 line 1 to 20 line 13 & 25 lines 7-19. Further, whatever the motivation, there is evidence that

the position was described in a manner that gave Boggs an advantage over other candidates.[5]

As the Magistrate Judge noted, however, such potential preferences are not, alone, evidence of racial discrimination. *See Parrott v. Cheney*, 748 F. Supp. 312, 316-17 (D. Md. 1989) (stating that a special relationship or favoritism alone does not constitute actionable discrimination), *aff'd* 914 F.2d 248 (4th Cir. 1990) (table). Indeed, the particular preferences alleged would have worked to the disadvantage of all applicants other than Boggs, regardless of race. Therefore, while it is possible that a tactic of favoring particular candidates might be used as a means of evading racially neutral hiring requirements, Anderson has offered no evidence that this was the motivating force as to this particular position.[6] *See generally Lowery v. Circuit City Stores, Inc.*, 206 F.3d 431, 446 (4th Cir. 2000) (noting that while "subjective and unstructured" system does not alone support finding of intentional discrimination, a jury question is presented if evidence of such a system is coupled with evidence that the executive responsible for

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[5] Given that Boggs was already performing the duties of the new position, and that Boggs' supervisor was pleased with her performance, it is not surprising that the CBPS documents would be drafted in a manner that created a built-in bias in favor of Boggs. While the hiring supervisor testified that she would have hired someone else if that candidate had received higher scores and interview ratings, the court will assume that such a result was unlikely given the slant in the CBPS documents.

[6] In her deposition, Anderson could point to nothing other than her personal belief as her basis for alleging that the decision was racially motivated. Anderson Depos. at 139 lines 7-20. *See also* Anderson's Objection Memorandum at 15 (arguing that "Subjective personnel policies and practices must be carefully scrutinized because of the ease with which they may disguise . . . unlawful discrimination" but offering no evidence of racial motivation).

establishing the system harbors racial bias); *Barnett v. W.T. Grant Co.*, 518 F.2d 543, 550 (4th Cir. 1975) (recognizing the capacity of non-objective hiring standards to mask employer's refusal to hire because of race).

WSRC's evidence, by contrast, demonstrates that it utilized a Competency Based Posting System under which Anderson simply did not rate as highly as the two individuals selected for interviews. The hiring supervisor testified that Anderson had the third highest score of the forty-seven candidates as to the competency criteria specified on the Professional Position Submittal Form. Because of the overall low scores, however, only the two individuals with the highest scores met the cut-off point for interviews.[7] Virginia Wolfe Depos. at 62 lines 7-24.

While Anderson scored highly on the "Core Competencies" (Team Work, Leadership, Communications, Employee Development, Business Results, and SelfManagement), her scores were extremely low on the "Functional Competencies" (Info Management, Customer Support, Performance Tracking and Marketing). For instance, she received only a "1" (on a scale of 0 to 3) on "Performance Tracking" (described as requiring maintenance of tracking databases and creation of status reports). She also received a "1" on "Marketing" (described as requiring proficiency in desktop publishing and use of certain databases). WSRC4016061.

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[7] Boggs' total score was 117 with a score of 57 on functional competencies. WSRC4015823. The other individual interviewed had a total score of 63, with a score of 35 on functional competencies. Anderson's scores in these areas were 68 and 9 respectively. Wolfe's contemporaneous memorandum indicates that the panel used a cut-off score of 50% on all competencies (total score 60) and 60% on functional competencies (functional competency score of 34 points).

She received a "0" on the two other competencies. By contrast, Boggs received a rating of "3" on each of these categories.

Anderson does not direct this court to evidence that would support the conclusion that she deserved a higher rating on any of these areas or, more critically, that the panel overlooked evidence of her abilities in these areas contained in her application.[8] Rather, as with the December 1997 application, she focuses on her supposed greater qualifications in terms of total years of employment or education. *Supra* at 5-6 (quotation from Objection Memorandum, addressing both applications).

Under these circumstances, it is doubtful that Anderson has made out her prima facie case as to qualifications. This court need not, however, resolve that query as it is clear that she has not proffered sufficient evidence to present a genuine issue of material fact as to whether the legitimate reason offered by WSRC for its hiring decision is pretextual.

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[8] Apparently the majority of the applicants for the job did not gear their applications to the stated criteria. *See generally* WSRC4015818-824 (competency rating sheets for all candidates indicating "no evidence of comps" for many of the candidates, a large number of whom received all "0" ratings); WSRC4015825 (post interview memorandum from Wolfe complaining that "HR is not adequately screening candidates . . . . Of 47 candidates for this position, 60 percent . . . showed absolutely no evidence of any of the competencies."). Based on the difficulties posed by these failures, the hiring supervisor (Wolfe) asked the Human Resources Department to advise future applicants to "provide clear evidence that the applicant possesses the core and functional competencies described in the posted position."

Failure to Promote in Place – Disparate Treatment Claim.

Anderson also objects to the Magistrate Judge's recommendation as to her "promotion in place" claim. This claim is based on WSRC's failure to increase the grade of Anderson's position after she received additional job duties. The particular position at issue is an Administrative Assistant position to which Anderson was promoted in August 1998, two months after she received her Master's Degree in Business Administration. At the time Anderson received this promotion, the position was given a grade of SGL 28 based on its projected duties.[9] In July 2000, Anderson assumed additional responsibilities after her initial supervisor left WSRC. Anderson agreed to accept these additional duties at the request of her new supervisor but made clear that she expected the position to be upgraded to reflect the additional responsibilities.

The Magistrate Judge recommended that WSRC be granted summary judgment on this claim on two grounds. First, he concluded that no prima facie case was made out because the two proffered comparators (Craig Stripling and Michelle Trill) were not similarly situated. Second, he concluded that Anderson had offered no evidence that the proffered legitimate reasons for denial of the promotion were pretextual. Plaintiff objects to both grounds for the recommended grant of summary judgment.

As to the first ground, Anderson concedes that there are numerous differences between herself and the proffered

[9] The position was apparently newly created.

comparators.[10] She argues, nonetheless, that they are comparable for a single limited purpose: to demonstrate that there was no policy prohibiting promotions within two years of the last promotion. The relevance of these two comparators depends, then, on whether WSRC denied Anderson's promotion based on a time-in-grade limitation as Anderson suggests was the reason she was given for the non-promotion at the relevant time.[11] In the first instance, the statement which Anderson alleges was made by her second level supervisor was that promotions "were not *usually* given until an employee had been in a position for two to four years, *but that [she might] be able to get a field promotion*." Anderson Affid. ¶ 7 (emphasis added). Thus, Plaintiff s own testimony does not support the conclusion that this statement was given as a reason why no promotion could be given.

Moreover, Plaintiffs' own testimony, given in her deposition and affidavit, supports the conclusion that her job was, in fact, reviewed for possible upgrade on various occasions during the relevant time frame. She also concedes that she had a number of conversations with various individuals in personnel or management roles during the relevant period in regard to ongoing, albeit unsuccessful,

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[10] In her objection memorandum, Anderson acknowledges that the proffered comparators were "not in the same department as Anderson" and that they "had different job titles, seniority, training, experience, qualifications, [and] supervisors."

[11] Here again, Anderson directs the court not to the relevant evidence, but to an earlier memorandum. This is not a proper means of directing the court to the applicable record evidence. The court has, nonetheless, reviewed the incorporated pages of the earlier memorandum which, in turn, refer to Plaintiff's own affidavit. The particular statements on which Anderson relies are discussed in the text.

attempts to upgrade her position. She does not direct this court to any evidence that any of these individuals relied on a time-in-grade prohibition as a reason for any denial or delay in promotion.

In short, while Anderson may feel that all that should have been done to advance her promotion was not done, her own recitation of events is inconsistent with any claim that WSRC *relied* on a time-in-grade bar. Rather, the only evidence is that such a limit was mentioned at some point in time as a possible, but not insurmountable, concern. The limited purpose for which Anderson now argues Stripling and Trill may be considered comparators is, therefore, irrelevant.[12]

Further, as discussed by the Magistrate Judge, Anderson has offered no evidence that WSRC's proffered legitimate reasons for not granting the promotion-in-place are pretextual. As noted above, Anderson concedes that her job was, in fact, reviewed on several occasions during this time period to determine if an upgrade could be made. She has offered no evidence to contradict WSRC's proffered testimony explaining the substantive grounds on which the requested upgrade was denied: that the job duties simply did not warrant an upgrade under WSRC's grading system. Further, WSRC has offered evidence that as a result of one of the earlier reviews (before the extra duties were added) it determined that the job rated only an SGL 26. While WSRC declined to downgrade the job on this occasion, the determination supports its later determination

[12] WSRC also argues that one of the two proffered comparators would not be comparable even for this purpose in that this comparator's promotion was not a promotion-in-place, but a competitive promotion under the CBPS system.

that the subsequent addition of duties only raised the job to its originally projected level.[13] There is, moreover, no evidence offered of any similar position for which a higher grade was given.

The claim for denial of a promotion-in-place, therefore, fails for lack of a prima facie case. Further, even if a prima facie case was made out, Plaintiff has offered no evidence to challenge WSRC's articulated legitimate reason for not raising the grade of the position despite the addition of some duties.

RP3 Ranking & Merit Pay Claim – Disparate Treatment.

Anderson also objects to the Magistrate Judge's recommendation that her claim for disparate treatment based on her 1999 performance rating and a corresponding pay raise be dismissed. The rating claim is based on the fact that Anderson received a "B" rating, rather than the "A" rating, which is reserved for the top 15% of employees in a division. As to the pay rate, Anderson alleges that she

[13] The individuals responsible for conducting a review in 1999 concluded that the position only merited an SGL 26; rather than the SGL 28 originally approved, due to a decrease in responsibilities over those originally projected. The job rating was not, however, changed. A 2001 review concluded that the position then rated an SGL of 28, presumably due to the added duties. A later review did suggest that the position might rate an SGL 29, but uncontradicted testimony supports WSRC's position that the next step on the Administrative Assistant job ladder is an SGL 30. Thus, no change could be made. *See* R&R at 11. Anderson has made no objection to any of these facts recited in the R&R and Plaintiff has offered no evidence to contradict the validity or accuracy of the various reviews.

received a lower percentage increase than another employee who also received a "B" rating.

The Magistrate Judge recommended that both aspects of the claim be dismissed. As to the challenged rating, the Magistrate Judge appears to have relied, in part, on the conclusion that the rating could not constitute an adverse employment action. On this point, this court disagrees because the rating is used to determine the percentage of any raise.

Nonetheless, this aspect of the claim cannot survive. This is because Plaintiff has failed to direct this court to any evidence that she was entitled to a higher rating than she received. Instead, she argues only that WSRC's claim that the ratings are within the discretion of the manager is enough to establish pretext. While the discretionary nature of a decision may create more potential for discrimination, it is not, alone, evidence that the decision was discriminatory. *See generally Barnett,* 518 F.2d at 550. This court, therefore, adopts the Magistrate Judge's Recommendation that this aspect of the claim be dismissed, albeit on somewhat modified grounds.

The issue of whether Plaintiff was treated differently as to the percentage increase is rather complex, as the evidence suggests that various factors are considered, including both the rating and whether the individual is above or below the median for his or her grade. On this point, the Magistrate Judge accepted WSRC's position that Plaintiff's proffered comparator, Faye Mellard Williams, received a slightly higher percentage increase because she was further below the median than Anderson. (There [sic] relative raises were 3.68% (Anderson) and 4.57% (Williams)).

Anderson argues that this conclusion is flawed because there are numerous reasons a person might be at a given point on the pay scale, including factors such as years at the site. While this may be true, it is not clear what the relevance would be. The query is not why an individual might be at a given point on the pay scale *at the time a raise is given*. Rather, the question is whether WSRC's proffered reason for differences in the percentages given to persons with the same rating (their relative positions on their pay scales) is false.

While Anderson has failed to direct the court to any specific evidence of pretext, evidence submitted by WSRC raises questions as to just how the percentages to be applied were determined. Most particularly, attachments to the affidavits of Lee Bellmer, Jr. suggest that WSRC used some method that did not always result in a person closer to the median (or above it) receiving a lower percentage than another employee with the same rating whose salary was further below the median.[14] E.g., Affid. of Lee Bellmer, Exhibit 1 (chart showing salary increase percentages). Manuals submitted by WSRC also suggest that there is a degree of discretion in the amount to be awarded. *See* User Guide to Ranked Performance Pay

[14] WSRC directs this court's attention to a white male with a B rating who received a 3.03% increase, less than Anderson's percentage increase. This individual appears to have been at the median at the time the raise was given, thus, closer than Anderson who was at .93 of median when the raise was given. The raise given this white male is, therefore, consistent with what the court understands WSRC's position to be. There are, however, other persons with B ratings whose raises are reflected on the same sheet and who were either closer to the median than Anderson or who were above the median and who received a greater percentage raise than Anderson. The percentages of these raises would appear to be inconsistent with WSRC's position.

Process at WSRC 3020931 & 3030933 (appearing to indicate that a percentage within a range is inserted based on the user's discretion). This evidence suggests that WSRC's explanation of why Anderson received a lower percentage raise than her proffered comparator, is less than complete. Under these circumstances, this court finds that a jury question is presented as to whether WSRC's proffered explanation of how the percentages were determined is pretextual and, therefore, whether the true reason for the differences was race based.

CBPS – Disparate Impact Claim.

The sole remaining claim is Anderson's disparate impact claim relating to the method used for selecting applicants for promotion under CBPS. Specifically, Anderson has challenged the subjectivity of the second and third steps of the process or, more accurately, has challenged the failure of WSRC to insure that the persons exercising the subjective judgment are racially diverse.

The Magistrate Judge recommended that WSRC be granted summary judgment on this claim because Anderson had failed to establish either element of her prima facie case (adequate specification of the challenged employment practice and demonstration of causation) and because she had failed to set forth an appropriate alternative system.

In *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 991 (1988), the Court held that "subjective or discretionary employment practices may be analyzed under the disparate impact approach in appropriate cases." After holding that disparate impact analysis could be applied to subjective employment practices, the Court addressed the

difficulties in proof that it recognized would be presented. Acknowledging that the ruling would create an "inevitable focus on statistics," the Court stated:

> It is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance. . . . It would be equally unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces.

In light of these concerns, the Court held that

> plaintiff's burden in establishing a prima facie case goes beyond the need to show that there are statistical disparities . . . . *The plaintiff must begin by identifying the specific employment practice that is challenged . . . [which] may sometimes be more difficult when subjective selection criteria are at issue. . . . [T]he plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities.*

Watson, 487 U.S. at 994 (emphasis added).

It seems doubtful that the generic identification of "subjectivity," which is inherent in any interview process, would satisfy the requirement that Plaintiff identify a "specific employment practice." Otherwise, it seems unlikely the Court would have acknowledged that the task "may sometimes be more difficult when subjective selection criteria are at issue." While Plaintiff's identification of the panel's lack of diversity may be more specific, it raises troubling questions as to whether a diversity requirement might constitute an impermissible quota. *See Watson*, 487

U.S. at 993 (acknowledging that "extending disparate impact analysis to subjective employment practices has the potential to create a Hobson's choice for employers and thus to lead in practice to perverse results" including use of "quotas and preferential treatment" as a means of "avoiding expensive litigation and catastrophic liability," and further noting that such quotas or preferential treatment would be "contrary to Congress' clearly expressed intent"). This court will not resolve these difficult questions, however, as Anderson's claim clearly fails due to the lack of proof of causation.

Anderson has identified only two instances in which she believes she was subjected to discrimination through the CBPS process: when she applied for Administrative Assistant positions in December 1997 and January 1998. This court's focus for purposes of the disparate impact claim is, therefore, limited to these two particular applications of the process which are also discussed above to the extent they are advanced as disparate treatment claims.

Beyond the evidence addressed above as to the corresponding disparate treatment claims, Anderson appears to rely on statistical evidence which demonstrates a statistically significant variation between the number of African-Americans who apply and the number who are successful at both the second and third step of the CBPS process.[16]

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[16] As to the December 1997 application, Anderson was one of eighty-five applicants of whom fifteen, including Anderson, were interviewed. As to the January 1998 application, she was one of forty-seven candidates, only two of whom, not including Anderson, received interviews. Thus, the focus of the inquiry would be on the third step (panel interview) in regard to the 1997 application and on the second step (grading by panel) as to the 1998 application.

She concedes, however, that the underlying study did not control for possible legitimate causes of the variations and that additional proof of causation, in the form of controlling for other variables, is necessary.[16]

In the present case, it is clear that the statistical evidence offered does not control for any of the myriad of possible legitimate causes of the statistical disparity. Thus, some other control (that is, further proof of causation through elimination of other causes), is necessary to allow reliance on the statistical evidence. The only such evidence which is before the court which might be relevant to this inquiry is evidence specific to Plaintiff's CBPS based claims. In short, at this point the disparate impact and disparate treatment prima facie case seem to collapse into each other.

This court will assume for present purposes that the proffered statistical evidence of disparate impact might be sufficient in its current form to cure defects in Anderson's prima facie disparate treatment case. The question of other potential causes would, then, need to be addressed.

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[16] In *Watson*, the Court stated that "plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions *because of their membership in a protected group*." *Id.*, 487 U.S. at 994 (emphasis added). Noting that it had never framed the test "in terms of any rigid mathematical formula," the Court stressed that the "statistical disparities must be sufficiently substantial that they raise such an inference of causation." *Id.*, 487 U.S. at 994-95. The Court then noted that defendants could challenge the statistical evidence by, inter alia, demonstrating that the plaintiffs had used "small or incomplete data sets [or] inadequate statistical techniques.... Similarly, statistics based on an applicant pool containing individuals lacking minimal qualifications for the job would be of little probative value," *Id.*, 487 U.S. at 996-97.

The court cannot see how this proof would be any different than that offered at the pretext stage of the prima facie case. Thus, even assuming that the statistical evidence is of some use to Plaintiff, her disparate impact claims suffer the same fate as her disparate treatment claims relating to the same promotions because she has failed to proffer sufficient evidence of pretext to present a jury question.

CONCLUSION

For the reasons set forth above, the court adopts the Report and Recommendation to the extent it recommends that the court grant Defendant WSRC's Motion for Summary Judgment as to all three promotion based disparate treatment claims and the disparate impact claims. The court also adopts the Report and Recommendation to the extent it recommends summary judgment for WSRC on any claim for failure to receive an "A" rating. The court declines to adopt the Report and Recommendation only to the extent it recommends dismissal of the merit pay claim based on the variation in percentages awarded to persons receiving a "B" rating as to the 1999 pay raise. This matter shall, therefore, be set for trial in the December term of this court which shall commence with jury selection on December 2, 2002.

IT IS SO ORDERED.

/s/ Cameron McGowan Currie
CAMERON MCGOWAN CURRIE
UNITED STATES DISTRICT JUDGE

Columbia, South Carolina
October 15, 2002

PUBLISHED

Filed: August 9, 2005

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

VIRGINIA ANDERSON,
Plaintiff-Appellant,

and

SHERMAN T. LOTT; VERNELLE PAYTON; LARRY COLEMAN; AVA HAWKINS; CURTIS YOUNG; CLINTON EDWARDS, JR.; FRANCIS H. NEWMAN, JR.; SAMUEL QUILLER; PAMELA WADE; BENNIE BREELAND; GLENN STEPHENSON; KENNETH L. BRADY, SR.; CLYDE REED; ROBIN HOLMAN; JOHN L. NAYLOR; GWENDOLYN H. WATTS; ALTON BARNES; HAYWARD ERVIN; ALANA J. LEWIS; DEBRA A. WILLIAMS; JIMMIE LEE TURNER; WILLIAM BONAPARTE, JR.; JEFFREY A. MYERS; JOHNNY J. HOLMES; JAMES SHERMAN, III; DEBBIE S.G. POPE; CHARLES JONES; ANNIE B. LOTT-ABNEY; OLIVIA G. GAVIN; DIANE J. CRAWFORD; MAXINE S. WHITE; MARVIN MOORE; BERTHA LEGREE; IRMAGENE REED; WILLAR H. HIGHTOWER, JR.; JEFFREY A. BAILEY; CONSTANCE DORSEY; RYSON CARTER; RHONDA M. TILLER; PEGGY M. POLLOCK; CALVIN L. COOKS; GLORIA J. COLLINS; DANITA L. MYLER; PATRICIA LANGFORD; DELORES BEASLEY; MARY L. JOHNSON; MOSES MYERS; BENITA BASS; LINCHIE H. SIMMONS; WALTER

No. 03-1150(L)
CA-98-2075-1-23-BC

DAISE; WANDA Y. SMITH; BERNARD NORA; CAROLYN W. THORPE; TOMMY A. CAMPBELL; DONALD F. BROOKS; LEWIS HOLSTON; DEITRA M. POUGH; ANGELA Y. HOLBROOK; PHYLLIS A. CALHOUN-HURLEY; NORRIS V. ROUSE; URSULA D. GAY-FURSE; DEBRA GANTT; ELVIRA JOHNSON; WILLIAM R. HALL; SHARON M. CAMPBELL; WINSTON BUTLER; QUITMAN WHITE; LEON BAKER; LINDA B. BAKER; GEORGE BUSH; GARY L. CARTER; CURTIS COKER, JR.; DIANNE T. DAVIS; SANDRA HARRISON; CHARLOTTE JOHNSON; TYRONE DAVIS; MARINDA B. JOHNSON; JOHNNY KING; DELORES MARTIN; CLINTON L. MCCALLA; DOUGLAS MCKENZIE; MARILYN MCKIE; MARLENE L. MOORE; JAMES MOTON; GOLDIE S. RANDLE; THOMAS WILLIAMS; JOSEPH RIDEAUX; WILLIAM L. RYANS; DIANNE S. SCOTT; VERONICA SHAW; MICHAEL STALEY; CALVIN R. SUBER; GEORGE A. TAYLOR; ELLEN M. VESSEL; KENNETH E. VINSON; HOPE YARBOROUGH, for themselves and on behalf of all others similarly situated,

Plaintiffs,

v.

WESTINGHOUSE SAVANNAH RIVER COMPANY; THE BABCOCK & WILCOX SAVANNAH RIVER COMPANY, INCORPORATED; BRITISH NUCLEAR FUELS LIMITED

SAVANNAH RIVER CORPORATION;
BECHTEL SAVANNAH RIVER,
INCORPORATED,
Defendants – Appellees

NAACP LEGAL DEFENSE AND
EDUCATION FUND, INC.,
AMICUS Supporting Appellant,

EQUAL EMPLOYMENT ADVISORY
COUNCIL; CHAMBER OF COMMERCE,
Amici Supporting Appellees.

ORDER

I.

Upon a request for a poll of the court on the petition for rehearing en banc, Judges Michael, Motz, King, Gregory and Duncan voted to grant the petition for rehearing en banc. Judges Widener, Wilkinson, Niemeyer, Luttig, Williams, Traxler and Shedd voted to deny rehearing en banc.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing en banc shall be, and it hereby is, denied.

II.

The panel considered the petition for rehearing. Judge Gregory voted to grant the petition for rehearing, and Judges Widener and Niemeyer voted to deny the petition for rehearing.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing shall be, and it hereby is, denied.

III.

Judge Gregory filed a dissent to this order, which is attached hereto.

Being disqualified, Judge Wilkins did not participate in the proceedings with respect to this case.

/s/ H. E. Widener, Jr.
For the Court

GREGORY, Circuit Judge, dissenting.

Despite being presented with statistical evidence showing that the subjective employment stages in question selected applicants for hire and promotion in a racial pattern different from that of the pool of applicants, this Court has determined that Virginia Anderson failed to state even a prima facie case of disparate impact discrimination. In my view, we have set the bar too high with regard to Title VII disparate impact cases. As a court, we are now on record as not only requiring almost certain causation to demonstrate a prima facie case but also requiring a *McDonnell Douglas* showing, in effect forcing a disparate impact claimant to show intent. In other words, what was a high jump has now become a pole vault that must be accomplished without a pole.

Regardless of precedential value, it is difficult to see how a potential claimant perusing our jurisprudence in this area would not read this opinion as evincing some disfavor for Title VII disparate impact cases. At every turn the majority opinion took pains to impose upon the disparate

impact claimant a standard higher than that required by Title VII jurisprudence. Ultimately, this approach resulted in dismissing a potentially legitimate claim before a trial could be had to discern whether the defendants violated the mandates of Title VII. I fear that this outcome will have the effect of discouraging future Title VII claimants with legitimate claims from proceeding before this Court.

I can only hope that a higher court will remedy the error committed here.

FILED

No. 05-616 NOV 7 2005

OFFICE OF THE CLERK

In The Supreme Court of the United States

VIRGINIA ANDERSON,

Petitioner,

v.

WESTINGHOUSE SAVANNAH RIVER COMPANY, LLP; BECHTEL SAVANNAH RIVER, INC.; THE BABCOCK & WILCOX SAVANNAH RIVER COMPANY, INC.; and BRITISH NUCLEAR FUELS LTD. SAVANNAH RIVER CORP.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
AIKEN DIVISION

VIRGINIA ANDERSON, Plaintiff, vs. WESTINGHOUSE SAVANNAH RIVER COMPANY, LLP, Defendant.	Civil Action No. 1:00-1667-22BC **MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION** (Filed Aug. 29, 2002)

Plaintiff, Virginia Anderson ("Anderson"), brings this action against her employer, Westinghouse Savannah River Company, LLC ("WSRC"), alleging discrimination based on her race. Following the Court's order denying class certification in *Lott, et al. v. WSRC, et al.*, 98-2075-22BC, Anderson filed the present complaint. Her claims are contained in a Fourth Amended Complaint. Pretrial matters were referred to the undersigned pursuant to 28 U.S.C. § 636 and Local Rule 73.02(b)(2)(g), D.S.C. WSRC filed a motion for summary judgment, or in the alternative, for partial summary judgment on February 1, 2002. Anderson filed an opposition memorandum on March 8, 2002, and WSRC filed a reply on March 22, 2002.

CLAIMS

Anderson claims that she was discriminated against on the basis of her race in violation of the Civil Rights Act of 1866, as amended, 42 U.S.C. § 1981 ("§ 1981"), and the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et*

seq. ("Title VII").[1] Specifically, she alleges disparate treatment claims consisting of three instances in which WSRC failed to promote her, and a separate claim that she was subjected to discriminatory pay and performance ratings. Anderson also alleges that WSRC's Competency Based Posting System disparately impacted African-American workers at WSRC.

FACTS

Anderson is an African-American woman currently working at the Savannah River Site ("Site"). The Site is a Department of Energy facility that currently stores and processes radioactive waste and other hazardous waste materials. In 1989, WSRC assumed responsibility for managing the Site. Ambrose Schwallie ("Schwallie") Dep. 8. Anderson began working at the Site in May 1978, as a Typist. Anderson Dep. 14-17. She was promoted to Stenographer approximately one year later, and was promoted to Administrative Secretary at a Salary Grade Level ("SGL") 16 in 1988. Anderson Dep. 17-24, 29. Anderson received a Bachelor of Science in Human Resource Management in December 1996. Anderson Dep. 44; Anderson Aff., Para 2.

Anderson alleges that she was discriminated against in December 1997, because she did not receive a promotion to an Administrative Assistant position, SGL 28, that she applied for through the Competency Based Posting System

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[1] The standard for establishing claims of employment discrimination under either Title VII or §1981 is the same. *See Gairola v. Commonwealth of Virginia Dep't of General Serv.*, 753 F.2d 1281, 1285-86 (4th Cir. 1985). Therefore, the analysis that follows, though couched in terms of Title VII, applies equally to Plaintiff's § 1981 claims, except where noted otherwise.

("CBPS").[2] Anderson Dep. 102-103, 107; Dec. 1997 Admin. CBPS File at WSRC 4014691. A white employee, Linda Clarke, was selected for the position. December 1997 Admin. CBPS File at WSRC 4014610-11 (Plaintiff's Opp. Mem., Ex. 8).

In January 1998, Anderson claims that she was discriminated against because she did not receive a promotion to another Administrative Assistant position, SGL 28/30, which she applied for through the CBPS. Anderson Dep. 103, 123-124, 129-130, 133-134; Jan. 1998 Admin CBPS File at WSRC 4015849 (Plaintiff's Opp. Mem., Ex. 12). Anderson did not receive an interview and Brenda (Pearson) Boggs, a white employee, was chosen for the position.

Anderson earned a Masters Degree in Business Administration in June 1998. Anderson Aff., Para. 2. In August 1998, she received a promotion to Administrative Assistant, SGL 28, Selected Overtime Pay ("SOP"), in the University Relations Group. Anderson Dep. 29-30, 44-45. After her promotion, until approximately July 2000, Anderson's direct supervisor was Eldon Keller ("Keller"). Anderson claims that WSRC discriminated against her after Keller left WSRC in July 2000. She claims that she should have received a promotion within her job because she assumed some of Keller's job duties with the understanding that she would be promoted based on the Site's

[2] The CBPS is a job posting system implemented by WSRC in mid-1997, through which most exempt job openings at the Site must be filled. 5B Manual at 006991-006993; L. Myers Dep. 238-244; Schwallie Dep. 17-18. The CBPS does not apply to promotions within what the Site terms "career job ladders," (Schwallie Dep. 17-18, 88-89), or to "developmental" or "rotational" promotions (L. Myers Dep. 132).

policy of increasing an employee's SGL in recognition of the employee's acceptance of additional duties. Anderson Aff. at 5.

Anderson also makes claims concerning her performance evaluation and merit increase. During the 1998-1999 performance evaluation period, Anderson received a Ranked Performance Pay Plan ("RP3")[3] rating of "B."[4] 10/1/98-9/30/99 PADP, Anderson at WSRC 3215825, 3215829 (Plaintiff's Opp. Mem., Ex. 22). RP3 rankings affect the amount of pay increases that exempt employees receive. L. Myers Dep. 90; 1999 Salary Increase Plan at 3030366. Anderson appears to claim that she should have received an "A" rating (which is reserved for only the top fifteen percent of employees in a particular division) (L. Myers Dep. 101) which would have allowed her a larger pay increase.

SUMMARY JUDGMENT STANDARD

When no genuine issue of any material fact exists, summary judgment is appropriate. *Shealy v. Winston,* 929 F.2d 1009, 1011 (4th Cir. 1991). The facts and inferences to be drawn from the evidence must be viewed in the light most favorable to the non-moving party. *Id.* Courts take special care when considering summary judgment in

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[3] In or about 1997, the Site began using the Performance Assessment and Development Plan ("PADP") and the RP3. The PADP is a performance evaluation and professional development guide used for most employees (exempt and non-exempt). Schwallie Dep. 39; Myers, L. Dep. 123). The RP3 is a performance evaluation and pay increase system that affects exempt and SOP employees. PADP Handbook.

[4] Employees evaluated under RP3 receive either an "A," "B," or "C" rating, with "A" as the highest rating and "C" as the lowest.

employment discrimination cases because states of mind and motives are often crucial issues. *Ballinger v. North Carolina Agric. Extension Sen.*, 815 F.2d 1001, 1005 (4th Cir.), *cert. denied*, 484 U.S. 897 (1987). This does not mean that summary judgment is never appropriate in these cases. To the contrary, "'the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material fact*.'" *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)). "Genuineness means that the evidence must create fair doubt; wholly speculative assertions will not suffice." *Ross v. Communications Satelliite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985).

In this case, the defendant "bears the initial burden of pointing to the absence of a genuine issue of material fact." *Temkin v. Frederick County Comm'rs*, 945 F.2d 716, 718 (4th Cir. 1991), *cert. denied*, 502 U.S. 1095 (1992) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). If defendant carries this burden, "the burden then shifts to the non-moving party to come forward with facts sufficient to create a triable issue of fact." *Id.* at 718-19 (citing *Anderson*, 488 U.S. at 248-48).

Moreover, "once the moving party has met his burden, the nonmoving party must come forward with some evidence beyond the mere allegations contained in the pleadings to show there is a genuine issue for trial." *Baber v. Hosp. Corp. of Am.*, 977 F.2d 872, 874-75 (4th Cir. 1992). The non-moving party may not rely on beliefs, conjecture, speculation, or conclusory allegations to defeat a motion for summary judgment. *Id.* and *Doyle v. Sentry Inc.*, 877 F. Supp. 1002, 1005 (E.D.Va. 1995). Rather, the non-moving party is required to submit evidence of specific

facts by way of affidavits, *see* Fed. R. Civ. P. 56(e), depositions, interrogatories, or admissions to demonstrate the existence of a genuine and material factual issue for trial. *Baber*, citing *Celotex Corp., supra*. Moreover, the nonmovant's proof must meet "the substantive evidentiary standard of proof that would apply at a trial on the merits." *Mitchell v. Data General Corp.*, 12 F.3d 1310, 1316 (4th Cir. 1993) and *DeLeon v. St. Joseph Hospital, Inc.*, 871 F.2d 1229, 1233 (4th Cir. 1989), n.7, *cert. denied*, 493 U.S. 825 (1989). Unsupported hearsay evidence is insufficient to overcome a motion for summary judgment. *Martin v. John W. Stone Oil Distrib., Inc.*, 819 F.2d 547 (5th Cir. 1987) and *Evans v. Technologies Applications & Services Co.*, 80 F.3d 954 (4th Cir. 1996).

DISCUSSION

WSRC argues that it is entitled to summary judgment, or, in the alternative, partial summary judgment because Anderson fails to establish a prima facie case of disparate treatment or disparate impact. Anderson argues that genuine issues of material fact are in dispute, that she has established each of her prima facie cases, and that she has demonstrated that WSRC's reasons for its actions are pretextual.[6]

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[6] WSRC, in its motion for summary judgment, argues that some of Anderson's Title VII claims were barred because they could not be "piggybacked." In its reply, however, WSRC withdrew its piggybacking argument. WSRC continues to assert that any Title VII claims arising before January 4, 1997 are barred, but notes that there is no indication that Anderson is alleging any such claims. For purposes of this report and recommendation, the undersigned concludes that Anderson's claims, which appear to have occurred after January 4, 1997, are not time-barred.

1. Disparate Treatment

Title VII makes it "an unlawful employment practice for an employer – (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . race. . . . " 42 U.S.C. § 2000e-2(a)(1). In a disparate treatment case the plaintiff must prove that "but for" his race, he would not have been subjected to an adverse employment action. *Holmes v. Bevilacqua,* 794 F.2d 142 (4th Cir. 1986). A plaintiff can prove defendant's motive to discriminate by two methods. First, the "plaintiff may meet this burden under the ordinary standards of proof by direct[6] and indirect evidence relevant to and sufficiently probative of the issue. In the alternative, a plaintiff may resort to the judicially created scheme established in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973) and *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248 (1981)." *EEOC v. Clay Printing Company,* 955 F.2d 936 (4th Cir. 1992).

In order to establish his prima facie case under the *McDonnell Douglas* scheme, a plaintiff must show that:

(1) he is a member of a protected class;

(2) he was qualified for his job and his job performance was satisfactory;

(3) he was subjected to an adverse employment action; and

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[6] Plaintiff has not presented any direct evidence of discrimination.

(4) other employees who are not members of the protected class were treated more favorably.

See Gairola v. Commonwealth of Virginia Dep't of General Serv., 753 F.2d 1281, 1286 (4th Cir. 1985); *Hughes v. Bedsole*, 48 F.3d 1376, 1383 (4th Cir.), *cert. denied*, 516 U.S. 870 (1995); *McDonnell Douglas*, 411 U.S. at 802 & n.13.

A. Failure to Promote

In order to establish a prima facie case of discriminatory failure to promote, a plaintiff is required to prove that:

(1) he is a member of a protected group;

(2) he applied for the position in question;

(3) he was qualified for the position; and

(4) he was rejected for the position in favor of someone not a member of a protected group under circumstances giving rise to an inference of unlawful discrimination.

Alvarado v. Board of Trustees of Montgomery Community College, 928 F.2d 118, 121 (4th Cir. 1991). The burden of establishing a prima facie case is not an onerous one. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. at 253. Under the familiar burden-shifting framework of the analysis for Title VII actions, once the plaintiff carries the initial burden of proving a prima facie case, the employer bears the burden of articulating a legitimate, non-discriminatory reason for the challenged employment decision. *McDonnell Douglas*, 411 U.S. at 802. If the employer provides the required evidence of a non-discriminatory reason for the action, the plaintiff must

then show that the proffered reasons were a pretext for discrimination. *Id.* at 804; *see also Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000).

(1) Prima Facie Case

WSRC argues that Anderson fails to establish her prima facie case concerning her "current" (Administrative Assistant SGL 28 position) position because she fails to establish that she applied for the position and because she fails to show that similarly-situated comparators were treated more favorably. WSRC argues that Anderson fails to establish her prima facie case concerning the December 1997 and December 1998 jobs because she fails to show that similarly-situated comparators were treated more favorably. Anderson argues that she was not required to apply for a promotion in her current position. She also argues that similarly-situated white comparators were treated more favorably in each instance. Specifically, she argues that she was more qualified than the white employees chosen for the December 1997 (Clarke) and January 1998 (Boggs) positions, and that certain white employees, Craig Stripling ("Stripling") and Michelle Trill ("Trill") were promoted in their positions at a quicker rate.

(a) December 1997 and January 1998 Promotion Claims

The undersigned concludes that Anderson fails to establish her prima facie case as to her December 1997 and January 1998 promotion claims because she fails to show that she was rejected for the positions in favor of someone not a member of a protected group under circumstances giving rise to an inference of unlawful discrimination, as she

fails to show that she was more qualified for the positions than Clarke and Boggs. Anderson does not appear to dispute that Clarke and Boggs were qualified for the positions for which they were selected but argues that she was more qualified than each of these employees because she had more education (Bachelor's and Master's degrees). There is, however, no indication that these administrative positions required Anderson's educational background. *See* Plaintiff's Opposition Memorandum, Ex. 8. Anderson appears to concede that Clarke and Boggs had more experience than Anderson in performing secretarial duties. Anderson's Opp. Mem. at 4, 7. Further, she appears to admit that Boggs' prior performance reviews indicated that Boggs had experience and proficiency in the skills necessary for the position. *Id.* at 7. Anderson, however, has not shown that she (Anderson) possessed the skills which Boggs possessed.

Anderson also argues that she was discriminated against because Boggs testified that the hiring manager expressed a preference to hire Boggs for the job before it was posted. Assuming the hiring manager expressed preference for Boggs, Anderson fails to show that this disadvantaged her on the basis of her race, rather than candidates of all races. *See Parrott v. Cheney,* 748 F. Supp. 312, 31 (D. Md. 1989) (stating that a special relationship or favoritism alone does not constitute actionable discrimination), *aff'd*, 914 F.2d 248 (4th Cir. 1990). Further, the hiring manager testified that she would hire the best candidate, and Boggs was selected on the basis of the findings of a three-person panel. Virginia Wolfe Dep. 58.

(b) Current Position Promotion Claim

The undersigned concludes that Anderson fails to establish a prima facie case as to her current position because she fails to show that Stripling or Trill were similarly situated to her.[7] In making a comparison of a plaintiff's treatment to that of employees outside the protected group, a plaintiff must show that the comparables are similarly situated in all relevant respects. *See Mitchell v. Toledo Hospital,* 964 F.2d 577 (6th Cir. 1992); *see also Lanear v. Safeway Grocery,* 843 F.2d 298 (8th Cir. 1988) (plaintiff must prove that he and non-protected employee were similarly situated in all respects and that the other employee's acts were of comparable seriousness to his own); *see also Heyward v. Monroe,* 166 F.3d 332, 1998 WL 841494 (4th Cir. Dec. 7, 1998) [Table] (employees similarly situated only if they "dealt with the same supervisor, [were] subject to the same standards and . . . engaged in the same conduct without such mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." (citations omitted)), *cert. denied,* 527 U.S. 1036 (1999); *Smith v. Stratus Computer, Inc.,* 40 F.3d 11 (1st Cir. 1994) (stating that, in disparate treatment cases, employees must be similar in "all relevant aspects" including performance, qualifications, and conduct) (citation omitted), *cert. denied,* 514 U.S. 1108 (1995). Stripling held positions as a Senior Operation Technician and an Associate Engineer, not an Administrative Assistant, he was not in the same department as Anderson, and he had a different supervisor. *See*

[7] Because Anderson fails to meet the fourth prong of her prima facie case it is unnecessary at this time to address whether she met the second prong (that she applied for the promotion) of her case.

Plaintiff's Opp. Mem. at 9. Trill holds a position as a Human Resources ("HR") Consultant, and Anderson has not presented any evidence that she and Trill have similar seniority, training, experience, qualifications, or supervisors.

(2) Legitimate, Non-discriminatory Reason, Pretext

WSRC argues that even if Anderson could establish her prima facie cases, she fails to show that its legitimate, non-discriminatory reasons for its actions are pretextual. Anderson argues that WSRC's reasons are pretextual because she was better qualified for the positions and because WSRC has failed to offer an explanation for not promoting her in her current position.

(a) December 1997 and January 1998 Promotion Claims

Even if Anderson could establish her prima facie cases, she fails to show that WSRC's legitimate, non-discriminatory reasons for not promoting Anderson to the January 1997 and January 1998 positions are pretextual. Anderson fails to show that the reasons asserted are false and as discussed above, she fails to show that the selected candidates were not better qualified than her for the specific jobs for which they were chosen.

(b) Current Position Promotion Claim

Even if Anderson could establish her prima facie case, she fails to show that WSRC's legitimate, non-discriminatory reasons for not promoting her in her

current position are pretextual. WSRC provides that Anderson was not promoted in her current job because she had not been there long enough, and that the company responded to her requests concerning a higher SGL, examined the positions, and found that the job did not merit a higher SGL.

Specifically, at the time Anderson's position was created, the Compensation section of the HR Department ("Compensation") reviewed a Position Analysis Questionnaire ("PAQ") and recommended an SGL of 28. Debra Muehlfeld Aff., Para 5, Exs. 1-2. In 1999, the Site's EEO office asked Compensation to evaluate Anderson's position. Muehlfeld Aff., Para. 6; Charles Hinton Aff., Para 5. Because the actual responsibilities of the position had decreased and changed from the projected responsibilities, Compensation found that the position merited an SGL of 26, but WSRC allowed Anderson to remain at SGL 28 without altering her responsibilities. Hinton Aff., Para 6, Ex. 3; Muehlfeld Aff., Para. 6-7, Ex. 6-7.

In 2001, Anderson's manager, Mel Buckner, proposed an increased SGL for her, but Compensation reviewed the PAQ submitted by Buckner and determined the position only merited an SGL 28. Dobyns Aff., Para. 5, Exs. 1-2; Hinton Aff., Para. 7; Muehlfeld Aff., Para 8, Exs. 8-10. Buckner tried to increase Anderson's responsibilities and submitted two more PAQs. Muehlfeld Aff., Para. 10, Exs. 12-14; Hinton Aff., Para 8, Exs. 4 and 6; Dobyns Aff., Para, 5-6, Exs. 1 and 3. Compensation later determined that the position merited an SGL of 29, but WSRC states that the next step on the administrative assistant job ladder is 30. Hinton Aff., Para. 8, Ex. 7; Dobyns Aff., Para. 6, Exs. 3-4.

B. RP3 Ranking/Merit Pay Claim

Anderson alleges that she suffered an adverse employment action in the form of an "average" merit increase during 1999 of 3.68%, although her SGL was below the midpoint, based on her "B" RP3 rating for the 1998-1999 evaluation year.[8] She alleges that a white employee in her same department and division, Faye Mellard Williams ("F. Williams"), also received a "B" rating, but was awarded a 4.57% merit increase. WSRC argues that Anderson fails to establish her prima facie case because she fails to show that similarly-situated employees were treated more favorably. Specifically, WSRC argues that Anderson fails to show that F. Williams is a similarly-situated employee because F. Williams had a different job title and was a SGL 29. Further, WSRC asserts that the amount of a merit increase takes into account whether an employee is above or below the midpoint for his or her salary range and grade level (Habasham Dep. 87-89; Lander Aff. at Exs. 5, 12) and that F. Williams earned less money than Anderson both before and after the merit increase and remained below Anderson's median SGL income level.

The undersigned concludes that Anderson fails to establish a prima facie case concerning her 1999 RP3 Ranking and Merit Pay increase fail as she fails to show that F. Williams, or any other similarly-situated employee outside the protected group, was treated more favorably.

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[8] Anderson argues that she should have received an "A" rating, rather than a "B" rating. She fails, however, to show that her performance evaluation alone constitutes an adverse action. *See, e.g., Page v. Bolger*, 645 F.2d 227, 233 (4th Cir.), *cert. denied*, 454 U.S. 892 (1981); *Settle v. Baltimore County*, 34 F. Supp. 969, 1009 (D.Md. 1999) (low performance rating is generally not actionable as an adverse employment action), *aff'd*, 203 F.3d 820 (4th Cir. 1999).

Even if Anderson were able to establish her prima facie case, she fails to show that WSRC's legitimate, non-discriminatory reason for giving F. Williams a higher merit increase (that F. Williams earned less and was further below the midpoint than Anderson both before and after their merit increases) is pretextual.

2. Disparate Impact

Anderson claims that the CBPS had a disparate impact on her in the second stage where certain qualified applicants are selected for an interview, and in the third stage where one or more interviewees are selected for the positions.[9] WSRC argues that Anderson's disparate impact claim fails because: (1) she has not identified the specific employment practice at issue, (2) her expert has failed to establish causation, and (3) she has not set forth an alternative system.[10] Anderson argues that she has established her

[9] Anderson appears to concede that she is unable to establish any other alleged disparate impact claims at this time due to exclusion of other testimony. *See* Plaintiff's Opposition Memorandum, at 27. WSRC appears to concede that Anderson may use the portions of Dr. Edwin L. Bradley's CBPS analysis that pertain to the interview and selection processes. *See* Defendant's Motion for Summary Judgment, at 26.

[10] WSRC also argues that the Fourth Circuit's finding in *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 759-61 (4th Cir. 1998), *vacated on other grounds*, 527 U.S. 1031 (1999) and *aff'd on reh'g*, 206 F.3d 431 (4th Cir. 2000), that "individuals do not have a private, non-class cause of action for pattern or practice discrimination[,]" should be extended to Anderson's individual disparate impact claim. It is recommended that this Court decline to do so at this time, as there is no indication that the Supreme Court or the Fourth Circuit have found that such claims are no longer viable. *See, e.g., Watson v. Fort Worth Bank and Trust*, 487 U.S. 977 (1988); *Davis v. Richmond, Fredericksburg & Potomac R.R. Co.*, 803 F.2d 1322, 1327 n. 3 (4th Cir. 1986) (rejecting a defendant's

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prima facie case because she identified the employment practice with enough specificity and has shown enough evidence of causation through statistical studies by Dr. Edwin Bradley, but that WSRC has failed to demonstrate business necessity.

To establish a prima facie-case of disparate-impact discrimination, a plaintiff must (1) identify the specific employment practice being challenged, and (2) show causation. *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 994 (1988). If a plaintiff establishes a prima facie case, the burden then shifts to the employer to produce evidence that the policy is job related and consistent with business necessity. *See id.* at 997-9, *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971). If the employer meets its burden, a plaintiff must show the availability of an alternative practice that would serve the asserted legitimate business needs of the employer without a corresponding prohibited discriminatory effect. *See, e.g., Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659-61 (1989); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975).

A. Prima Facie Case

WSRC argues that Anderson fails to allege with specificity her disparate impact claims. Anderson argues that she has identified two specific claims, consisting of two stages in WSRC's CBPS: "the second stage where certain qualified applicants are selected for an interview on a subjective basis, and the third stage where one or more of the interviewees are selected for the positions on a

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contention that a disparate impact theory is not available to an individual plaintiff).

subjective basis." Plaintiff's Opposition Memorandum, at 28.

Anderson fails to establish her prima facie case because she fails to identify the specific employment practice being challenged.[11] Here, Anderson has named the entire process, rather than specifying the "facially neutral standards which result in discriminatory [] practices . . . " *Steward v. Gwaltney of Smithfield*, 954 F. Supp. 1118, 1126 (E.D.Va. 1996). A plaintiff's initial responsibility is to identify and isolate the specific offending employment practice. *Watson* 487 U.S. at 994. Further, a plaintiff cannot use disparate impact theory "to attack the cumulative effects of an employer's practices." *Munoz v. Orr*, 200 F.3d 291, 299 (5th Cir.), *cert. denied*, 531 U.S. 812 (2000). Although processes that are not capable of separation may be analyzed as one employment practice, 42 U.S.C. § 2000e-2(k)(1)(B)(i), Plaintiff has not argued and/or shown that here.

Anderson argues that Dr. Bradley's studies show statistically significant differences between promotions under the CBPS experienced by African-American employees compared to white employees,[12] but she fails to identify

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[11] The cases cited by Plaintiff, *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 292-93 (2d Cir. 1999); *Mozee v. American Commercial Marine Serv. Co.*, 940 F.2d 1036, 1044 (7th Cir. 1991); and *Rose v. Wells Fargo*, 902 F.2d 1417, 1424-25 (9th Cir. 1990), support Anderson's assertion that subjective decisions maybe the subject of disparate impact, but fail to support Anderson's argument that her identified practices are specific enough to prove her prima facie case.

[12] Dr. Bradley states that his studies showed that of the 2,027 qualified candidates selected for an interview, 304 were African-American, but that 387 African-American employees should have been chosen for interviews. He states that this discrepancy represents a difference of -6.64 standard deviations. As to the selection of employees

(Continued on following page)

what process causes such differences. To show causation, a plaintiff must "offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group." *Watson*, 487 U.S. at 994. A plaintiff has to demonstrate that the disparity of which he complains is the result of the employment practice attacked. *Wards Cove Packing Co.*, 490 U.S. at 657. In her opposition memorandum, Anderson appears to argue that selections for interviews and positions occurred because in 96% of the selections the "hiring manager" (or person with final decision-making authority) was a white employee. Even if Plaintiff has identified the subjectivity of the white managers as the challenged employment practice, Dr. Bradley's statistics are not specific enough to show that subjectivity of these managers, in a system where others also have input in the promotion process (HR determines who is minimally qualified, a panel interviews and evaluates interviewees against the posted competencies, the hiring manager with input from the interview panel selects a candidate, and HR and the next level manager review the selection – Lander Aff. at Ex. 15, pp. 12-14), caused the identified differences.

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for the posted positions from those interviewed, Dr. Bradley states that of the 456 candidates selected that 52 were African-American, but that 64 African-American employees should have been chosen from the interviewees. He states that this discrepancy represents a difference of -2.38 standard deviations. Bradley Aff., Section 10.

B. Job Related/Business Necessity/Alternative System

Even if Anderson were to establish her prima facie cases, WSRC has shown that the CBPS system is "job related" and Anderson has not proposed an alternative practice that would serve WSRC's legitimate business needs without a corresponding prohibited discriminatory effect. Anderson argues that WSRC has not met its burden because it has not shown that the challenged business practices are "essential" to the performance of the position in question. WSRC argues that an employer does not have to show that a challenged practice is "essential," but just that the practice is "job related." WSRC argues that "[t]he CBPS System, with carefully defined competencies for each posted position and a multi-stepped review process with built in checks and balances, is designed to select the best qualified individual for each opening, and thus is job-related and plainly permissible." WSRC Motion for Summary Judgment, at 33 (citations omitted).

The Fourth Circuit, since the enactment of the Civil Rights Act of 1991,[13] has not specifically ruled on what

[13] In *Wards Cove*, the Supreme Court held that the burden of persuasion (after a plaintiff established his prima facie case) remained with the plaintiff and the defendant only had the burden of "producing evidence of a business justification for his employment practice." 490 U.S. at 659. The Supreme Court lessened the standard for this "business justification" to a "legitimate employment goal," stating that, "there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster." *Id.* In enacting the Civil Rights Act of 1991, Congress found, in part, that *Wards Cove* had "weakened the scope and effectiveness of Federal civil rights protections" and appears to have codified the concepts of job relatedness and business necessity as outlined by the Supreme Court in *Griggs*, *supra* and other pre-*Wards Cove* decisions. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, effective November 21, 1991

satisfies the requirements of showing that the questioned policy or practice is "job related for the position in question and consistent with business necessity." A number of courts which have addressed the issue, however, have not required that the practice be essential. *See Bew v. City of Chicago*, 252 F.3d 891, 894 (7th Cir. 2001) (employer must show challenged employment test "bear[s] a demonstrable relationship to successful performance of the jobs for which it was used.") (quoting *Griggs*, 401 U.S. at 431), *cert. denied*, ___ U.S. ___, 122 S.Ct. 545 (2001); *Evers v. Alliant Tech Systems, Inc.*, 241 F.3d 948, 953 & 955 (8th Cir. 2001) (employer showed legitimate business reason defeating plaintiff's prima facie case by demonstrating sharp decline in revenue that necessitated reduction in force); *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1117-1118 & 1119 n. 5 (11th Cir. 1993); *see also Long v. First Union Corp. of Va.*, 894 F. Supp. 933, 940 (E.D. Va. 1995) (employer must show business justification), *aff'd*, 86 F.3d 1151 (4th Cir. 1996); *but see Lanning v. Southeastern Pennsylvania Transp. Auth.*, 181 F.3d 478, 490 (3rd Cir. 1999) (business necessity standards demand that the challenged employment practice be shown to be "necessary for successful performance of the job in question in order to survive a disparate impact challenge.").

Anderson argues that even if WSRC has met its burden, that she has shown the availability of an alternative practice because WSRC was aware of and failed to adopt alternative selection procedures including the recommendation of WSRC's own EEO representative, Machell Mims, that WSRC make every effort to have a diverse panel and that he asked that one candidate be provided with face-to-face feedback as to why that candidate was not selected for an interview. Mims Dep. 50.

Anderson also poses as an alternative a DOE recommendation that WSRC should ensure that "all Interview Panels are diverse" and a proposed "crediting plan" for each position to be implemented before the job is advertised to indicate the quality, quantity, and/or knowledge, skill, or abilities required for each job. DOE Assessment 14-15. Anderson, however, has presented no evidence that these alternatives would result in the selection of the best qualified candidates without a corresponding prohibited discriminatory effect. *See Evers*, 241 F.3d at 954.

CONCLUSION

It is, therefore, recommended that WSRC's motion for summary judgment be granted in accord with the above discussion.

Respectfully submitted,

/s/ Joseph R. McCrorey
Joseph R. McCrorey

August 29, 2002

Columbia, South Carolina

Supreme Court, U.S.
FILED
JAN 17 2006
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No. 05-616

IN THE

Supreme Court of the United States

VIRGINIA ANDERSON

Petitioner,

v.

WASHINGTON SAVANNAH RIVER COMPANY, LLC; BECHTEL SAVANNAH RIVER INC.; BWXT SAVANNAH RIVER COMPANY; AND BNG AMERICA SAVANNAH RIVER CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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QUESTION PRESENTED

Whether, in applying settled law to the facts of record, the court below properly held that Petitioner had not established a triable disparate-impact claim under the Civil Rights Act of 1991 because Petitioner had failed to create a genuine question of material fact about whether a *specific* selection practice used by Respondents *caused* a disparate impact on the basis of race.

CORPORATE DISCLOSURE STATEMENT

Respondents make the following corporate disclosure statements pursuant to Supreme Court Rule 29.6:

Respondent Washington Savannah River Company, LLC (formerly known as Westinghouse Savannah River Company, LLP) is a wholly owned subsidiary of Washington Group International, Inc., a publicly held company No other publicly held company owns 10% or more of Washington Savannah River Company, LLC's stock.

Respondent Bechtel Savannah River Inc. is a wholly owned subsidiary of Bechtel National, Inc., a privately held company. No publicly held company owns 10% or more of Bechtel Savannah River Inc.'s stock.

Respondent BWXT Savannah River Company (formerly known as The Babcock & Wilcox Savannah River Company, Inc.) is a wholly owned subsidiary of BWXT Federal Services, Inc., which is ultimately a wholly owned subsidiary of McDermott International, Inc., a publicly held company. No other publicly held company owns 10% or more of BWXT Savannah River Company's stock.

BNG America Savannah River Corporation (formerly known as British Nuclear Fuels Ltd. Savannah River Corporation) is a wholly owned subsidiary of BNG America, a privately held company. No publicly held company owns 10% or more of BNG America Savannah River Corporation's stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

A. The Site And The Competency Based Posting System 1

B. Virginia Anderson And Her Applications For Promotion 3

1. Virginia Anderson's Employment History 3

2. Anderson's 1997 Application For Promotion 4

3. Anderson's 1998 Application For Promotion 4

C. The Decisions Below 5

REASONS FOR DENYING THE WRIT 7

I. THE DECISION BELOW CORRECTLY APPLIED SETTLED LAW TO THE UNDISPUTED FACTS OF RECORD AND DOES NOT MERIT THIS COURT'S REVIEW 9

II. ANDERSON MISCHARACTERIZES THE DECISIONS OF THE COURT BELOW, OF THIS COURT, AND OF OTHER CIRCUITS, AND FAILS TO DEMONSTRATE A SPLIT OF AUTHORITY 14

CONCLUSION 23

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) 20
Allen v. Seidman, 881 F.2d 375 (7th Cir. 1989) 20
Anderson v. Zubieta, 180 F.3d 329 (D.C. Cir. 1999) 15, 19
Bazemore v. Friday, 478 U.S. 385 (1986) 7, 17, 18, 19
Berger v. Iron Workers Reinforced Rodmen Local 201, 843 F.2d 1395 (D.C. Cir. 1989) 19, 20
Bernard v. Gulf Oil Corp., 841 F.2d 547 (5th Cir. 1988) 20
Bouman v. Block, 940 F.2d 1211 (9th Cir. 1991) 20
Brown v. Coach Stores, Inc., 163 F.3d 706 (2d Cir. 1998) 18
Bullington v. United Air Lines, Inc., 186 F.3d 1301 (9th Cir. 1999) 20
Byrnie v. Town of Cromwell, Board of Education, 243 F.3d 93 (2d Cir. 2001) 11
Carroll v. Sears, Roebuck & Co., 708 F.2d 183 (5th Cir. 1983) 18
Connecticut v. Teal, 457 U.S. 440 (1982) 14, 20
Cooper v. Southern Co., 390 F.3d 695 (11th Cir. 2004), *cert. denied*, 126 S. Ct. 478 (2005) 12
Donnelly v. Rhode Island Board of Governors for Higher Education, 110 F.3d 2 (1st Cir. 1997) 11
Dothard v. Rawlinson, 433 U.S. 321 (1977) 20
EEOC v. General Telephone Co. of Northwest, Inc., 885 F.2d 575 (9th Cir. 1989) 18
EEOC v. Steamship Clerks Union, 48 F.3d 594 (1st Cir. 1995) 20
In re Employment Discrimination Litigation Against State of Alabama, 198 F.3d 1305 (11th Cir. 1999) 21
Frazier v. Consolidated Rail Corp., 851 F.2d 1447 (D.C. Cir. 1988) 16
Gonzales v. Crosby, 125 S. Ct. 2641 (2005) 7, 8
Griggs v. Duke Power Co., 401 U.S. 424 (1971) 14, 19, 20

TABLE OF AUTHORITIES
(Continued)

Page

Hameed v. International Association of Bridge, Structural & Ornamental Iron Workers, 637 F.2d 506 (8th Cir. 1980) 20
Howard v. BP Oil Co., 32 F.3d 520 (11th Cir. 1994) 16
Mangold v. California Public Utilities Commission, 67 F.3d 1470 (9th Cir. 1995) 15
McDonnell Douglas v. Green, 411 U.S. 792 (1973) 14, 15
McNairn v. Sullivan, 929 F.2d 974 (4th Cir. 1991) 11
Michigan v. Lucas, 500 U.S. 145 (1991) 8, 17
Morgan v. United Parcel Service, 380 F.3d 459 (8th Cir. 2004), *cert. denied*, 125 S. Ct. 1933 (2005) 19
Munoz v. Orr, 200 F.3d 291 (5th Cir. 2000) 11, 15
Newark Branch, N.A.A.C.P. v. Harrison, 940 F.2d 792 (3d Cir. 1991) 20
Newark Branch, N.A.A.C.P. v. City of Bayonne, 134 F.3d 113 (3d Cir. 1998) 11, 18
Ortega v. Safeway Stores, Inc., 943 F.2d 1230 (10th Cir. 1991) 11
Overton v. Ohio, 534 U.S. 982 (2001) 8
Palmer v. Schultz, 815 F.2d 84 (D.C. Cir. 1987) 18
Phillips v. Cohen, 400 F.3d 388 (6th Cir. 2005) 20
Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955) 7, 9
Smith v. Xerox Corp., 196 F.3d 358 (2d Cir. 1999) 15
Stout v. Potter, 276 F.3d 1118 (9th Cir. 2002) 11
Waisome v. Port Authority, 948 F.2d 1370 (2d Cir. 1991) 20
Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) ..... *passim*
Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988) ..... *passim*

TABLE OF AUTHORITIES
(Continued)

Page

FEDERAL STATUTES & RULES

42 U.S.C. § 2000e-2(k)(1) 9, 10, 21
Supreme Court Rule 10 ..... 7, 9

MISCELLANEOUS

Robert L. Stern, *et al.*, *Supreme Court Practice* § 4.3, at 225 (8th ed. 2002) 8

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The petition for a writ of certiorari arises out of a controversy that began when Petitioner Virginia Anderson and 98 other named plaintiffs filed a class complaint in 1997 seeking to represent all African-American employees at the United States Department of Energy's Savannah River Site (the "Site"). The Site is managed by Respondent Washington Savannah River Company, LLC with the assistance of Respondents Bechtel Savannah River Inc., BWXT Savannah River Company, and BNG America Savannah River Corporation (collectively, "Respondents"). Pet. App. 5. Of the 99 initial named plaintiffs, all but eight—Anderson and seven others who are presently appealing the grants of summary judgment on their claims to the Fourth Circuit—subsequently settled, dismissed, or otherwise abandoned their claims. In the proceedings below, the Fourth Circuit, like the district court, held that Anderson had failed to make out a triable disparate-impact claim because she did not show that a *specific* employment practice used by Respondents *caused* a disparate impact on the basis of race. Pet. App. 29-31. The Fourth Circuit also unanimously affirmed the district court's grant of summary judgment on Anderson's disparate-treatment claims, rejected her challenges to various evidentiary rulings by the district court, and agreed with the district court that no class had to be certified on the record before the court. Pet. App. 17-50.

A. The Site And The Competency Based Posting System

The Site is a Department of Energy facility that stores and processes radioactive waste and other hazardous waste materials. Pet. App. 5. In May 2000, approximately 13,100 employees worked at the Site for the four Respondents. Joint Appendix in the Fourth Circuit ("J.A.") 2945. At that

time, there were approximately 1,500 managers and supervisors at the Site, and approximately 200 of them were African-American. J.A. 2944.

In the mid-1990's, the Site implemented the Competency Based Posting System ("CBPS"), which Anderson alleges has a disparate-impact on African-American employees. Pet. App. 6. Under the CBPS, the Site posts exempt job openings and invites any employee, exempt or nonexempt, to apply. Pet. App. 7. Each job posting lists both "minimum qualifications" and necessary "core" and "functional" competencies. Pet. App. 10. "Core competencies" are requirements for all jobs—teamwork, leadership, communications, employee development, business results, and self-management. *Id.* Prior to a job posting, the manager with the job opening assigns a weight to each "core competency" in light of the specific job to be filled. *Id.* In addition, the manager identifies specific "functional competencies" unique to the specific job opening and assigns a weight to each. *Id.*

The Site's Human Resources ("HR") Group reviews all applications for completeness, determines which applicants meet the specified minimum qualifications, and forwards to the pertinent manager the application materials for all minimally qualified candidates. Pet. App. 8. The manager, either singly or with the assistance of one or more knowledgeable individuals, then compares the application materials, rates applicants according to the core and functional competencies listed in the job posting, and selects the most qualified candidates for interviews. *Id.*

The manager next forms an interview panel of himself or herself and two other individuals familiar with the job requirements. *Id.* The panel interviews and evaluates the candidates in writing, again based on the core and functional competencies. Pet. App. 8, 10. The manager, aided by the two other panelists, preliminarily identifies the most

qualified candidate, and an HR Lead and the next level of management must approve the manager's preliminary selection decision. Pet. App. 9-10.

Anderson's expert witness, Dr. Edwin L. Bradley, purported to identify a disparity between the percentage of African-American employees who succeeded at each stage of the CBPS and the percentage that he expected to succeed. Pet. App. 29-30. But in making this comparison, Dr. Bradley did not account for any variables besides race and job title. *Id.*; J.A. 8082-92. Nor did he isolate and test which, if any, selection criteria accounted for the disparity, even though such a determination would have been possible because Respondents maintain records of criteria-specific scores assigned to applicants for jobs posted through the CBPS. Pet. App. 30; J.A. 11065-11170, 11187-93. Indeed, Dr. Bradley claimed that he did not even know any of the factors that affected promotion decisions at any of the challenged stages of the CBPS. J.A. 8082-92. Thus, his study merely tested the cumulative effect of all selection criteria at each stage of the CBPS, and did not even attempt to demonstrate that a specific selection criterion caused a disparate impact on African-American employees. Pet. App. 29-31.

B. Virginia Anderson And Her Applications For Promotion

1. Virginia Anderson's Employment History

Petitioner Virginia Anderson began her employment at the Site in May 1978 in the typing pool; she had only an executive secretarial diploma. Pet. App. 5-6. In April 1989, Anderson was promoted to Administrative Secretary, a position with a Salary Grade Level ("SGL") of 16, in the Strategic Materials Technology Department. *Id.*; J.A. 10931-34. In December 1996, Anderson received a bachelor's degree. Pet. App. 6. On her 1997 evaluation, created while she was studying for an M.B.A., Anderson

expressed the goal of being promoted into an exempt position in her related field of study by March 31, 1998. J.A. 10980. Anderson received her M.B.A. in June 1998 and, just over one month later, was promoted to Administrative Assistant, a position with a SGL of 28, in the University Relations Group. Pet. App. 6.

2. Anderson's 1997 Application For Promotion

In late 1997, Anderson and approximately 85 other employees applied for an Administrative Assistant position in the Environmental Restoration Division. Pet. App. 13; J.A. 11062-63, 11065-70. Fifteen interviewees were selected, including Anderson and a white female, Linda Clarke. Pet. App. 13-14. The hiring manager and two other panelists interviewed each candidate. Interview scores ranged from 129.5 to 190: Anderson received the second-lowest interview score of 136; a white employee received the lowest score of 129.5; and Clarke was one of two individuals to receive the highest score of 190. Pet. App. 14. Clarke was deemed the best candidate and was hired at an SGL of 28. Pet. App. 13, 70. The interview panel noted that Clarke "demonstrated [a] very positive attitude," was "very customer focused," and gave "very good examples of processes she had made changes to for consistency or efficiency." J.A. 11080-81.

3. Anderson's 1998 Application For Promotion

Anderson also applied in early 1998 for an Administrative Assistant Position in the Business Development and Community Outreach Division. Pet. App. 14, 39. An interview panel led by the hiring manager, Virginia Wolfe, reviewed applications and gave Anderson a high score on core competencies (only two other people received higher scores), but a low score for functional competencies (eight other people received higher scores). Pet. App. 14, 77; J.A. 11186-95. Based on the relative cumulative scores of the candidates, Anderson was not chosen for an interview. Pet.

App. 14. Rather, the panel interviewed the two applicants with the highest scores and thereafter selected the one who had received the higher score, Brenda Pearson, for the position. Pet. App. 14, 40.

Pearson, who was a Senior Secretary when she applied, had over 24 years of administrative and staff support experience. J.A. 11196-11202. As a secretary reporting to Wolfe, Pearson had already learned the functions of the Administrative Assistant position, which, among other things, included performing marketing communications, doing desktop publishing, preparing technology briefs and brochures, preparing press releases and mailings, responding to Internet inquiries, and performing market research. Pet. App. 40-41; J.A. 11174-79.

In contrast, Anderson had never attended desktop publishing and Internet usage training, and she had never before worked in the Business Development and Community Outreach Division. J.A. 10925-35, 10959-60, 10965-67. In addition, Anderson's application materials "did not reflect capabilities that would match the four areas of functional competencies." J.A. 11181-85.

C. The Decisions Below

As pertinent to the question presented in the petition for a writ of certiorari, the district court granted summary judgment on Anderson's claim that the CBPS had an unlawful disparate-impact. Quoting this Court's opinion in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988), the district court explained that, while subjective employment practices may be challenged under a disparate-impact theory, the "plaintiff's burden . . . goes beyond the need to show that there are statistical disparities." Pet. App. 86. It further explained that plaintiff must also "isolat[e] and identify[y] the specific employment practices that are allegedly responsible for any observed statistical disparities." *Id.* (emphasis omitted). The district court

expressed "doubt[] that the generic identification of 'subjectivity,' which is inherent in any interview process, would satisfy the requirement that [Anderson] identify a 'specific employment practice,'" but held that, in any event, "Anderson's claim clearly fails due to the lack of proof of causation" because Dr. Bradley did "not control for *any* of the myriad of possible legitimate causes of the statistical disparity" that he identified. Pet. App. 86, 87 (emphasis added).

The Fourth Circuit affirmed. The court initially assumed, *arguendo*, that, challenging particular steps of the CBPS was sufficient to identify the employment practices being challenged (insofar as each step comprised multiple "core" and "functional" competencies that are used as selection criteria, such as "business results," "leadership," and "communications"). Pet. App. 29. But the court held that Anderson had not established that any particular employment practice had *caused* a disparate impact on the basis of race because Dr. Bradley had merely "compared the percentage of black employees who actually succeeded at each level [of the CBPS] with the percentage which he expected to succeed"—without "account[ing] for *any* other variables" and without testing which, if any, selection criteria accounted for the disparity. Pet. App. 30 (emphasis added). Indeed, the court stressed that multiple variables affect promotion decisions under the CBPS, including the core and functional competencies considered at each stage. *Id.* The court concluded that Dr. Bradley's evidence could not establish causation because identifying a disparity, without more, "does not show that the *reason* black applicants" were excluded from jobs or promotions was that a *particular* employment practice caused a disparate impact on the basis of race. *Id.* (emphasis added).

Judge Gregory dissented in part. Judge Gregory agreed with the majority that the district court had properly granted summary judgment on Anderson's disparate-treatment

claims, that Anderson's challenges to various evidentiary rulings by the district court were meritless, and that no class had to be certified on the record before the court. Pet. App. 50. Nevertheless, Judge Gregory argued that Dr. Bradley's study regarding the CBPS supported an inference of causation and allowed Anderson to make out a triable disparate-impact claim. Pet. App. 58-63.

Anderson sought rehearing and rehearing *en banc* on numerous questions, including whether *Watson* "permits statistical analysis of challenged employment policies that include both subjective and objective criteria"; whether the panel's opinion contravened *Bazemore v. Friday*, 478 U.S. 385 (1986), by finding that Dr. Bradley's statistics were insufficient to establish causation; and whether the panel improperly applied a disparate-treatment standard to Anderson's disparate-impact claim. *See* Anderson's Pet. for Reh'g and Reh'g *En Banc* at 1-15. (Only the latter two questions are within the scope of the petition for a writ of certiorari.) The court denied rehearing (by a 2-1 vote) and rehearing *en banc* (by a 7-5 vote). Pet. App. 92. Judge Gregory dissented, again writing to express the view that, on the facts of record, Anderson had made out a triable disparate-impact claim. Pet. App. 93-94.

REASONS FOR DENYING THE WRIT

Under this Court's rules, the Court will expend its limited resources to review a case only where there are "compelling reasons" for doing so, such as a conflict between the holding of the court below and that of this Court or another appellate court "on the same important matter" of federal law. *See* Supreme Court Rule 10. A case is *not* suitable for this Court's review where the issue on which review is sought is narrowly fact-bound, *see, e.g., Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955); or where a petition seeks error correction with respect to the alleged misapplication of a settled rule of law, *see* Supreme Court Rule 10; *Gonzales v.*

Crosby, 125 S. Ct. 2641, 2655 n.7 (2005) (Stevens, J., dissenting) ("error-correction is a disfavored basis for granting review"); *Overton v. Ohio*, 534 U.S. 982, 985 (2001) (Breyer, J., dissenting from denial of cert.) ("[W]e cannot act as a court of simple error correction."). Moreover, a "*genuine* conflict" of authority that may merit this Court's review arises only "when it may be said with confidence that two courts have decided the same legal issue in opposite ways, based on their holdings in different cases with very similar facts." Robert L. Stern, *et al.*, *Supreme Court Practice* § 4.3, at 225 (8th ed. 2002) (emphasis added). In contrast, a case is not an appropriate candidate for this Court's review where a petition demonstrates, at most, "an inconsistency in dicta or in the general principles utilized" by two courts, *see id.*; or that a lower court's "opinion could have been written more precisely than it was," *see Michigan v. Lucas*, 500 U.S. 145, 155 (1991) (Stevens, J., dissenting).

Under these standards, this petition for a writ of certiorari should be denied. The Fourth Circuit's decision correctly applies settled, uniform legal precedents to the undisputed facts of record and creates no new principles of law. Indeed, the Fourth Circuit's holding that Anderson failed to establish a triable question of material fact about whether a specific employment practice used by Respondents caused a disparate impact on the basis of race was compelled by the Civil Rights Act of 1991 and by this Court's opinions in *Watson* and *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). Anderson's argument to the contrary, in an attempt to demonstrate a conflict of authority, fundamentally misinterprets the opinion of the court below and the decisions of this Court and of other circuits, and ignores the record evidence in this case. At bottom, Anderson simply disagrees with the factbound result reached by the Fourth Circuit, in large part because she chooses to disregard the undisputed record. But the Fourth Circuit's decision was correct, and in any event, this Court does not "sit for the

benefit of . . . particular litigants," *Rice*, 349 U.S. at 74, who claim to be aggrieved by "the misapplication of a properly stated rule of law," Supreme Court Rule 10.

I. THE DECISION BELOW CORRECTLY APPLIED SETTLED LAW TO THE UNDISPUTED FACTS OF RECORD AND DOES NOT MERIT THIS COURT'S REVIEW.

The decision below announced no new principle of law and rested upon the factbound application of settled law to the undisputed record in this case. Accordingly, the decision below does not warrant consuming this Court's limited resources to review.

The Fourth Circuit properly held that Respondents are entitled to summary judgment on Anderson's disparate-impact claim involving the CBPS because Anderson failed to establish a triable question of material fact about whether a specific selection criterion used by Respondents caused a disparate impact on the basis of race. To establish a disparate-impact claim, a plaintiff must satisfy the rigorous standards set forth in the Civil Rights Act of 1991:

> (1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if – (i) a complaining party demonstrates that a respondent uses a *particular* employment practice that *causes* a disparate impact on the basis of race.
>
> (B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that *each particular challenged employment practice causes* a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

42 U.S.C. § 2000e-2(k)(1)(A), (B) (emphasis added).

The statute embraces pre-enactment case law stating that a disparate-impact claim legally fails where a plaintiff has not identified a *specific* selection criterion and shown that the particular criterion *causes* a disparate impact. Specifically, in *Watson*, Justice O'Connor wrote that:

> [T]he plaintiff's burden in establishing a *prima facie* case [of disparate-impact discrimination] goes beyond the need to show that there are statistical disparities in the employer's work force. The plaintiff must begin by identifying the *specific* employment practice that is challenged . . . . Especially in cases where an employer combines subjective criteria with the use of more rigid standardized rules or tests, the plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities.

487 U.S. at 994 (plurality opinion) (emphasis added). Moreover, the "plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has *caused* the exclusion of applicants for jobs or promotions *because of their membership in a protected group*." *Id.* (emphasis added)

One year later, in *Wards Cove*, 490 U.S. at 656-57, a majority of this Court quoted and adopted Justice O'Connor's approach in *Watson*, stressing that "[o]ur disparate-impact cases have always focused on the impact of *particular* hiring practices on employment opportunities for minorities." (emphasis in original.) Thus, "a Title VII plaintiff does not make out a case of disparate impact simply by showing . . . [a] racial imbalance in the [employer's] work force." *Id.* at 657 (emphasis omitted). Rather, "a plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack." *Id.* (explaining that plaintiffs must

"demonstrate that the disparity they complain of is the result of one or more of the employment practices that they are attacking . . . specifically showing that each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites").

The courts of appeals have uniformly applied these standards and held that a disparate-impact claim fails where the plaintiff does not show that a racially disparate impact was *caused* by a particular employment practice. *See, e.g.*, *Donnelly v. R.I. Bd. of Governors for Higher Educ.*, 110 F.3d 2, 4 (1st Cir. 1997) (plaintiff "failed to establish . . . the existence of a causal relationship between the [challenged practice] and any purported disparate impact"); *Byrnie v. Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 111 (2d Cir. 2001) (plaintiff "fail[ed] to suggest what specific employment practice accounts for" the disparity identified); *Newark Branch, N.A.A.C.P. v. City of Bayonne*, 134 F.3d 113, 121, 124 (3d Cir. 1998) (plaintiffs "simply have not shown that [the challenged practice], *independent of other factors that may affect the racial balance of the workforce*, is *causally* related to discrimination in the number of blacks hired or promoted") (emphasis added); *McNairn v. Sullivan*, 929 F.2d 974, 979 (4th Cir. 1991) (plaintiff "does not attempt to show that the [challenged] subjective element of HHS promotion criteria significantly affected qualified blacks' and Hispanics' chances to be promoted"); *Munoz v. Orr*, 200 F.3d 291, 299-300, 303-04 (5th Cir. 2000) (plaintiffs failed to show that alleged disparate impact was caused by challenged practice); *Stout v. Potter*, 276 F.3d 1118, 1121, 1125 (9th Cir. 2002) (plaintiffs challenging stages of a selection process failed to show which "discrete elemen[t]" of the process—such as "the applicant's supervisor evaluations" and scores on eleven "competencies"—"caus[ed] . . . the claimed gender disparity"); *Ortega v. Safeway Stores, Inc.*, 943 F.2d 1230, 1242-43, 1245-46 (10th Cir. 1991) (plaintiffs failed to show that the challenged employment practice, rather than

employees' preferences and qualifications, caused a gender disparity); *Cooper v. Southern Co.*, 390 F.3d 695, 724 (11th Cir. 2004) (plaintiffs "failed to demonstrate a causal nexus between any statistical disparities in the defendants' workforce and the [challenged] practice of using partially subjective hiring criteria"), *cert. denied*, 126 S. Ct. 478 (2005).

Applying these settled principles to the particular factual record before it, the Fourth Circuit correctly concluded that Anderson had failed to establish a triable question of material fact about whether a specific selection criterion used by Respondents caused a disparate impact on the basis of race. As an initial matter, while Anderson challenged the second and third stages of the CBPS and the alleged subjectivity inherent in those stages, *see* Pet. 17-18, she did not identify any *specific* selection criterion, subjective or otherwise, within those CBPS stages that allegedly had a disparate impact on African-Americans, as she was required to do. *See Wards Cove*, 490 U.S. at 656-57; *Watson*, 487 U.S. at 994. While the Fourth Circuit was willing to assume, *arguendo*, that challenging particular steps of the CBPS was sufficient to identify the employment practices being challenged, Pet. App. 29, the court nevertheless quite correctly held that Anderson had not provided evidence that any one (or more) of these selection practices had *caused* a disparate impact on the basis of race, because Dr. Bradley had merely "compared the percentage of black employees who actually succeeded at each level [of the CBPS] with the percentage which he expected to succeed"—without "account[ing] for *any* other variables" besides race and without testing which, if any, selection criteria accounted for the disparity. Pet. App. 30 (emphasis added). Merely identifying a disparity, without more, the court explained, "does not show that the *reason* black applicants" were excluded from jobs or promotions was that a *particular* employment practice caused a disparate impact on the basis of race. *Id.* (emphasis added).

The Fourth Circuit's decision is wholly unremarkable. It does not establish any new principle of law; it follows settled law. Nor does the decision even err in applying these settled principles of law; Anderson has never even claimed to have shown which core or fundamental competencies or other selection device caused a disparate impact. Indeed, Dr. Bradley admitted that he did not even know any of the factors that affected promotion decisions at any of the challenged stages of the CBPS. J.A. 8082-92.

There is no error here, much less an error resulting from an important question of law as to which other courts have disagreed. As the Fourth Circuit stressed, it is undisputed that the CBPS constrains managers' subjective discretion at each stage through six core competencies necessary for all jobs as well as functional competencies unique to each job opening, with a weight assigned to each competency. Pet. App. 30. In addition, Respondents maintain records of criteria-specific scores assigned to applicants for jobs posted through the CBPS. J.A. 11065-11170. Accordingly, Dr. Bradley could have determined what disparate impact, if any, the use of *each* core and functional competency had on African-American candidates. Because Dr. Bradley failed to show which aspect of the selection process—the use of a particular core or functional competency, the manager's involvement, the panel's involvement, the questions asked at the interview—allegedly caused the claimed disparate impact, and chose instead to test the *cumulative* effect of all selection criteria at each stage, the Fourth Circuit correctly, and consistently with the decisions of other courts, determined that his testimony was legally insufficient to establish the inference of causation required by *Watson*, *Wards Cove*, and the Civil Rights Act of 1991.

In short, the decision below is consistent with this Court's decisions and creates no new legal principles or split among the circuits. At bottom, Anderson simply disagrees with the Fourth Circuit's factbound application of longstanding legal

principles to the particular circumstances of this case. Her request for factbound error correction is itself wrong and in all events does not warrant this Court's review.

II. ANDERSON MISCHARACTERIZES THE DECISIONS OF THE COURT BELOW, OF THIS COURT, AND OF OTHER CIRCUITS, AND FAILS TO DEMONSTRATE A SPLIT OF AUTHORITY.

Ignoring the unbroken line of cases (and factual record) that support the Fourth Circuit's decision here, Anderson misinterprets the opinion below and the decisions of this Court and other circuits in an unavailing attempt to demonstrate a conflict of authority. The Court should ignore Anderson's misguided effort.

1. Echoing the misplaced assertions of the dissenting opinion below, Anderson argues that the Fourth Circuit majority, contrary to the decisions of other courts, erroneously applied the *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), disparate-treatment standard to her disparate-impact claim and incorrectly required her to prove intentional discrimination as an element of a disparate impact claim. Pet. 8-17. But the decision below did no such thing.

Consistent with the authority cited by Anderson, *see* Pet. 12-14, 25-26, the Fourth Circuit correctly explained the burden-shifting scheme applicable to disparate-impact claims, and at no point did it hold that proof of discriminatory intent is necessary for such a claim. *See* Pet. App. 27-29 (citing, *inter alia*, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and *Connecticut v. Teal*, 457 U.S. 440 (1982)). Rather, as explained above, the Fourth Circuit *held* that the district court had correctly granted summary judgment to Respondents on Anderson's disparate-impact claim with respect to the CBPS because Anderson failed to offer legally sufficient proof of causation, *not* because she

failed to prove intentional discrimination. Pet. App. 29-31; *see also supra* at 6, 12-13.

To be sure, the court below went on to address the argument—made by Anderson in her brief on appeal, *see* Appellant's Br. in the Fourth Circuit at 60, and challenged by Respondents, *see* Appellees' Br. in the Fourth Circuit at 54—that Dr. Bradley's study regarding the alleged disparate impact of the CBPS is, in the alternative, legally sufficient to establish the inference of intentional discrimination required for a disparate-treatment claim. Specifically, the court "assume[d] for argument, without deciding," that Dr. Bradley's evidence of adverse impact established a prima facie case of disparate treatment; the court identified the legitimate non-discriminatory reasons for the challenged employment decisions; and the court concluded that Anderson's evidence of pretext was legally insufficient to support a disparate-treatment claim under the *McDonnell Douglas* framework. Pet. App. 32-33. That inquiry, which Anderson herself urged the court to undertake, was quite proper and in no way applies disparate-treatment standards to a disparate-impact claim or requires Anderson to prove intentional discrimination to establish a disparate impact claim.

Indeed, that inquiry is neither relevant nor necessary to the court's *holding* that Anderson's disparate-impact claim failed because she did not make the requisite showing of causation. Rather, the court merely recognized, consistent with Anderson's own argument and with authority from other circuits, that a statistical showing of adverse impact may also be relevant to a disparate-treatment claim, and it asked whether that showing, combined with other evidence in the record, was sufficient to establish a triable claim of disparate treatment. *See, e.g.*, *Munoz*, 200 F.3d at 302; *Anderson v. Zubieta*, 180 F.3d 329, 339-40 (D.C. Cir. 1999); *Smith v. Xerox Corp.*, 196 F.3d 358, 370-71 (2d Cir. 1999); *Mangold v. Cal. Pub. Utils. Comm'n*, 67 F.3d 1470, 1476

(9th Cir. 1995); *Howard v. BP Oil Co.*, 32 F.3d 520, 527 (11th Cir. 1994); *Frazier v. Consol. Rail Corp.*, 851 F.2d 1447, 1449-53 (D.C. Cir. 1988). As the Fourth Circuit correctly held, Anderson's evidence of pretext is plainly insufficient to support such a disparate-treatment claim, and even Anderson, in her petition for certiorari, does not contend otherwise.

Anderson's allegation that the court below required her to prove intentional discrimination to establish her disparate-impact claim rests on an erroneous reading of the court's opinion. Indeed, in the eight months since the Fourth Circuit issued its opinion in this case, not a single decision, brief, law review article, treatise, periodical, or other source available on Westlaw or Lexis has interpreted the opinion below in the way that Anderson suggests. There is no basis for Anderson's assertion that the opinion below contravenes the decisions of this or other courts or presents a question of exceptional importance warranting this Court's review.

2. In a further unavailing attempt to demonstrate a circuit split that does not exist, Anderson also offers a litany of repetitive arguments regarding the Fourth Circuit's discussion of the flaws in Dr. Bradley's study. Pet. 17-29. Anderson again misconstrues the opinions of the Fourth Circuit, of this Court, and of other courts of appeals; fails to show a conflict of authority or any other basis for this Court's review; and is wrong on the merits of her factbound contentions.

a. As an initial matter, Anderson fundamentally misunderstands the decision below in arguing that the court imposed a "heightened standard of causation" and required disparate-impact plaintiffs to offer statistical evidence of intentional discrimination. Pet. 17. In explaining that Dr. Bradley's "evidence does not show that the reason black applicants failed to proceed at the interview selection stage and position selection stage was their race," Pet. App. 30, the

Fourth Circuit was merely adverting to the requirement, as expressed by this Court, that a disparate-impact plaintiff "offer statistical evidence of a kind and degree sufficient to show that the practice in question has *caused the exclusion of applicants for jobs or promotions because of their membership in a protected group*." *Watson*, 487 U.S. at 994 (emphasis added). In context, it is plain that both the district court and the Fourth Circuit faulted Dr. Bradley's study not for failing to show *intentional* discrimination (which disparate-impact plaintiffs are not required to do), but for failing to identify which specific employment practice that entered into and circumscribed "the judgment of the members of the panel"—factors such as "the core competencies listed in the CBPS manual," "the specific functional competencies," "education," "experience," "presentation in the interview, answers to interview questions, demeanor, and ability"—had caused the alleged disparity. Pet. App. 30, 86-87; *see also supra* at 5-6, 12-13. Whether or not the passage in question "could have been written more precisely than it was," Anderson's parsing of the Fourth Circuit's language provides no basis for granting certiorari. *See Lucas*, 500 U.S. at 155 (Stevens, J., dissenting) (explaining that this Court does "not [sit] as an editorial board of review").

b. Anderson likewise errs, and fails to demonstrate a conflict of judicial authority, in arguing that the decision below contravenes *Bazemore*, 478 U.S. 385, and its progeny. Pet. 19-25. This Court held in *Bazemore* only that the "omission of variables from a regression analysis" will ordinarily "affect the analysis' probativeness, not its admissibility." 478 U.S. at 400. Consistent with *Bazemore*—as well as *Watson*, *Wards Cove*, and the Civil Rights Act of 1991—the court below held that, because Dr. Bradley had failed to account for *any* variables besides race, and had failed to analyze whether specific selection criteria caused a disparate impact, his testimony, the *admissibility* of which the court acknowledged, was not *sufficiently probative*

to establish an inference of causation. *Bazemore* does not even speak to that question.

Anderson further errs in suggesting that the Fourth Circuit, in conflict with *Bazemore* and lower-court cases following it, erroneously imposed on her "the burden to demonstrate that including additional omitted variables" in Dr. Bradley's study would have "alter[ed] the statistical results." Pet. 21-22. Even where, unlike here, the admissibility of a regression analysis is at issue, there are "instances in which the relevance of a factor to the selection process is so obvious that the defendants, by merely pointing out its omission, can defeat the inference of discrimination created by the plaintiffs' statistics." *Palmer v. Schultz*, 815 F.2d 84, 101 (D.C. Cir. 1987) (citing *Bazemore*, 478 U.S. at 400 n.10); *see also EEOC v. Gen. Tel. Co. of N.W., Inc.*, 885 F.2d 575, 582 (9th Cir. 1989). More importantly, Anderson erroneously conflates the burdens of the parties in an admissibility determination with the *plaintiff*'s *substantive burden* to prove a *prima facie* case of disparate-impact discrimination. *See, e.g.*, *Wards Cove*, 490 U.S. at 656-57; *Watson*, 487 U.S. at 994; *Brown v. Coach Stores, Inc.*, 163 F.3d 706, 712 (2d Cir. 1998) (explaining that Title VII "places an initial burden on the plaintiff to show that the specific factor challenged under the disparate impact model results in the discriminatory impact"); *Newark Branch, N.A.A.C.P.*, 134 F.3d at 121-22 (explaining that "[t]he causal requirement recognizes that under representation of blacks might result from any number of factors, and it places an initial burden on the plaintiff to show that the specific factor challenged under the disparate impact model results in the discriminatory impact") (internal citations omitted); *Carroll v. Sears, Roebuck & Co.*, 708 F.2d 183, 189-90 (5th Cir. 1983) (same). The Fourth Circuit's decision comports with the settled rule that "a Title VII plaintiff does not make out a case of disparate impact simply by showing . . . [a] racial imbalance in the [employer's] work force." *Wards Cove*, 490 U.S. at 657 (emphasis omitted). Rather, the "*plaintiff*

must demonstrate that it is the application of a *specific* or *particular* employment practice that has created the disparate impact under attack." *Id.* (emphasis added).

Anderson also alleges that the Fourth Circuit, contrary to cases following *Bazemore*, improperly required a statistical analysis to "control for the very factors being challenged." Pet. 19-20. But Anderson again misunderstands both the Fourth Circuit's opinion and the cases from other circuits on which she relies, and she therefore fails to demonstrate a circuit split. The Fourth Circuit did *not* require Anderson to control for the employment practices that she challenges. Rather, because Dr. Bradley did not control for *any* variables besides race and job title, the court below simply held that he failed to show *which*, if any, selection practices caused the alleged disparate impact. *See supra* at 6, 12-13. In contrast, in *Zubieta*, 180 F.3d at 342, and *Berger v. Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395, 1414 (D.C. Cir. 1989), on which Anderson relies, the plaintiffs isolated a particular challenged practice that was responsible for the identified disparity. In that context, the D.C. Circuit explained that the plaintiffs were not required to *also* control for the specific practice being challenged because doing so would eliminate the very disparity at issue. *See Zubieta*, 180 F.3d at 342; *Berger*, 843 F.2d at 1417-18; *see also Morgan v. United Parcel Serv.*, 380 F.3d 459, 470 (8th Cir. 2004) (explaining that disparate-treatment plaintiffs improperly excluded potential legitimate explanatory variable from regression analysis where that variable did not reflect the very discrimination of which they complained) (cited at Pet. 20), *cert. denied*, 125 S. Ct. [illegible] (2005).

c. Finally, Anderson [illegible]s, and fails to show a split of authority, in arguing that the Fourth Circuit's discussion of Dr. Bradley's study runs afoul of *Griggs* and cases interpreting it by "impos[ing] an additional prima facie burden on disparate impact plaintiffs to account for other possible legitimate factors that could explain prima facie

statistical disparities." Pet. 25-28. The Fourth Circuit faulted Dr. Bradley's statistical study not for failing to account for all "*other* possible legitimate factors that could explain" the disparity that he identified, Pet. 25 (emphasis added), but for failing to show that *any* specific employment practice caused the disparity. That holding is entirely consistent with the cases cited by Anderson.

In all but two of these cases, unlike here, the plaintiffs showed that a specific employment practice or selection criterion caused the identified disparate impact. *See Teal*, 457 U.S. at 443 n.4, 445 (test); *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977) (height requirement); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) (test); *Griggs*, 401 U.S. at 430 n.6 (high school graduation requirement); *Berger*, 843 F.3d at 1414 (educational prerequisite to union membership); *EEOC v. Steamship Clerks Union*, 48 F.3d 594, 605 & n.12 (1st Cir. 1995) (membership sponsorship requirement for union membership; court stressed that "there is nothing to indicate any omitted variable"); *Waisome v. Port Auth.*, 948 F.2d 1370, 1378 (2d Cir. 1991) ("aspect of the examination's procedures [that] had a disparate impact"); *Newark Branch, N.A.A.C.P. v. Harrison*, 940 F.2d 792, 801 (3d Cir. 1991) (residency requirement); *Bernard v. Gulf Oil Corp.*, 841 F.2d 547, 560 (5th Cir. 1988) (reclassification of employees pursuant to stipulation between employer and union); *Allen v. Seidman*, 881 F.2d 375, 380 (7th Cir. 1989) (test); *Hameed v. Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers*, 637 F.2d 506, 513 (8th Cir. 1980) (high school graduation requirement); *Bouman v. Block*, 940 F.2d 1211, 1224 (9th Cir. 1991) (tests); *Bullington v. United Air Lines, Inc.*, 186 F.3d 1301, 1314 (9th Cir. 1999) (interview passage requirement).

In one of the remaining cases, *Phillips v. Cohen*, 400 F.3d 388 (6th Cir. 2005), the defendant conceded that the "entire promotion decision process should be considered as a whole to determine disparate impact," *id.* at 398, pursuant to the

statutory exception for "elements of a . . . decisionmaking process [that] are not capable of separation for analysis," 42 U.S.C. § 2000e-2(k)(1)(B)(i), a provision that does not apply here, *see infra* at 21-22. And in the final case cited by Anderson, *In re Employment Discrimination Litigation Against State of Alabama*, 198 F.3d 1305, 1324 (11th Cir. 1999), the court held that Congress had validly abrogated the states' Eleventh Amendment sovereign immunity in enacting the disparate-impact provisions of Title VII—an issue wholly inapposite here. Nothing in the cases cited by Anderson contravenes or conflicts with the decision below.

3. Anderson's remaining factbound criticisms of the Fourth Circuit's discussion of Dr. Bradley's statistical evidence are meritless and do not even purport to allege a conflict with other decisions or to raise an important federal question.

First, Anderson argues that Dr. Bradley's study did not need to control for any variables because the CBPS itself ensures that those candidates who reach the second and third stages of the process are at least minimally qualified according to objective criteria. Pet. 23-24. Anderson does not suggest that this factbound question presents a split of authority, an important question of federal law, or any other "compelling" basis for this Court's review. Supreme Court Rule 10. In any event, Anderson's argument does not show that all candidates considered at the second and third stages of the CBPS are *equally* qualified, nor, more importantly, does it address the principal infirmity in Dr. Bradley's study—his failure to identify which of the numerous subjective and objective factors that make up the stages of the CBPS account for the alleged disparity that he identified.

Second, although Anderson does not invoke (and has never invoked) the statutory exception for "elements of a . . . decisionmaking process [that] are not capable of separation for analysis," *see* 42 U.S.C. § 2000e-2(k)(1)(B)(i), she

nevertheless suggests that it is not possible to determine which of the factors that make up the CBPS caused the alleged statistical disparity that Dr. Bradley identified. Pet. 21 & n.11. Anderson does not suggest that this question is exceptionally important or that the Fourth Circuit's decision on this issue conflicts with decisions of this Court or others. In any event, as the court's opinion makes clear, *see* Pet. App. 7-9, 30-31, and as Respondents demonstrated in their brief on appeal, *see* Appellees' Br. in the Fourth Circuit at 2-3, and above, *see supra* at 1-3, 6, 12-14, the CBPS constrains managers' discretion through core competencies necessary for all jobs and through functional competencies unique to each job opening, with a weight assigned to each competency. In addition, Respondents maintain records of criteria-specific scores assigned to applicants for jobs posted through the CBPS. Accordingly, Dr. Bradley could have determined what disparate impact, if any, the use of *each* core and functional competency had on black applicants. Because he failed to do so and chose instead to test the cumulative effect of all selection criteria at each stage, his testimony was legally insufficient to establish the inference of causation required by *Watson*, *Wards Cove*, and the Civil Rights Act of 1991.

The Fourth Circuit's holding is consistent with the opinions of this Court and of other circuits. Anderson's factbound arguments to the contrary reflect a fundamental misunderstanding of the Fourth Circuit's opinion, of the opinions of other courts, and of the limited role of certiorari jurisdiction. At bottom, Anderson simply disagrees with the Fourth Circuit's application of settled law to the particular facts of her case. Her unfounded request for factbound error correction does not merit this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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